United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

77-7121

United States Court of Appeals

FOR THE SECOND CIRCUIT

DORALEE ESTATES, INC.,
Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,
Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,
Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

(Volume I of III—Pages A-1—A-446)

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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

JUDGE OWEN

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date:
by pltff. on 2-28-73
demands trial by a jury of twelve

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
DORALEE ESTATES, INC, A NEW YORK CORPORATION, Plaintiff	For plaintiff: GERALD GIGECK, 10 Chestnut Street, Liberty, New York 12754, 914-292-5800
CITIES SERVICE OIL CO., a Delaware Corporation, Defendant	
-v-	
MGO CORP and MONTICELLO GAS & OIL CO. INC. third party deft.	For defendant: Baer & Marks, 70 Pine St. NY 10005 422-4910
	Grubbs & Sutera, 10 Platt St, NYC 10038 747-5950 for third party deft.

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		
J.S. 5 mailed x	Clerk			2/28/73	Trgeon	15		
Re-opened 11-20-74				3/1/73				15
J.S. 6 mailed 2-2-77	Marshal							
Basis of Action: Damage to pltff's property $10,000	Docket fee							
	Witness fees							
Action arose at:	Depositions							

Doralee Estates, Inc, vs. Cities Service Oil Co.

73 CIV. 907

DATE	PROCEEDINGS	Date Order or Judgment Not
Feb.28-73	Filed complaint & issued summons	
Apr.9,73	Filed Summons with Marshal's Returns. Served: Cities Service Inc. by J. Stryker on 3/29/73. Cities Service Oil Co. -unable to serve. Made endeavor on 3/16/73.	
May 17,73	Filed Stip & Order extending time for deft Cities Service Oil Co to answer complaint to 5/18/73.Weinfeld,J.	
May 18,73	Filed Deft&3hd Pty Pltff's Complaint.	
May 22-73	Filed Notice of Deposition of Plaintiff upon oral examination.	R&M
May 22-73	Filed ANSWER to complaint.	
June-73	Filed summons and entered marshal's return served on: MCO Corp by Judith La Gautta on 5-24-73.,& Monticello Gas & Oil Co.Inc. by Judith La Gautta on 5-24-73.	
Jun20-73	Filed third party defts MCO Corp and Monticello ANSWER to the third party complaint.	G&S
Jun26-73	Filed deft's notice to take deposition of pltff and deft third party pltff on 7-3-73.	
Feb.13-74	Mailed notice of reassignment.	
[illegible]/74	Pre-trial before Owen J.	
[illegible]/74	Pre-trial-Hon Owen J.	
Oct. 4-74	Filed order of dismissal of complaint and 3rd pty complaint with permission to the parties to move to vacate within 30 days k-Owen, J. Mailed notices.	
Nov. 12-74	Filed pltff's affirmation & notice of motion to vacate dismissal-Ret. 11-15-74.	
Nov. 20-74	Filed memo endorsed on motion to vacate dismissal filed 11-12-74-Motion is granted. So Ordered--Owen, J. Mailed notices.	
2-13-75	PTC Hon Owen J.	
Sep12-75	Filed defts Cities Service Oil Co. Affidavit & Notice of Motion for an order compelling production of documents, etc, as indicated rtble before Owen, J. on 9-26-75.	
9-17-75	Filed memo endorsed on motion filed 9-12-75. : Motion denied. Owen, J. M/N	
11-11-75	Filed Notice that Pltff's trial counsel will be Gerald Orseck, etc, as indicated.	
11-14-75	Filed Pltffs. affidavit and notice of motion for an order to increase its AD DAMNUM CLAUSE IN ITS ACTION FOR PUNITIVE DAMAGES. Ret. 11-21-75.	
11-14-75	Filed Pltffs. Memorandum of Law in support of a Motion to increase its Ad Damnum Clause in its action for punitive damages.	
11-19-75	Filed affidavit of third party defts in opposition to the pltffs instant motion to increase the relief sought, etc, as indicated.	
11-19-75	Filed memo of law in opposition to pltffs motion to increase by eightfold the punitive damages sought.	
11-25-75	Filed Affirmation of deft Cities Service Oil Company in opposition to the pltff motion to increase its claim for punitive damages.	
11-25-75	Filed defts memorandum of law in oppisition to pltffs motion etc, as indicated	
12-3-75	Filed pltffs reply affirmation in support of the pltffs motion to increase ad damnum clause etc, as indicated.	
12-3-75	Filed pltffs reply memorandum of law in support of its motion to increase its claim for punitive damages, etc, as indicated.	
12-11-75	Filed memorandum of Cities Service Oil Co. in response to Pltff's. reply affirmation & memorandum.	
01-22-76	Filed Memo End on Pltff's. motion filed 11-14-75. Motion granted. An amended answer shall be served within 15 days hereof.....Owen,J. (mailed notice)	
02-10-76	PRE-TRIAL CONFERENCE HELD BY: Owen,J.	
03-18-76	Filed Stip & Order that Deft's. answer heretofore filed shall be deemed to be the amended answer of the Deft. to the amended complaint.....Owen,J.	
05-13-76	Filed Pltff's. requests to charge.	
12-6-76	PTC Hon Owen J.	
[illegible]	[illegible] notice to produce [illegible]	

Owen J.

Civ 907
CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO.
Doralee Estates	Cities Service Oil	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS
1-19-77		Filed trial memorandum of third party deft.
1-3-77		Trial by jury begun before J. Owen.
1-4-77		Trial cont.
1-4-77		Trial cont.
1-5-77		Trial cont.
1-6-77		Trial cont.
1-7-77		Trial cont.
1-11-77		Trial cont.
1-12-77		Trial cont.
1-13-77		Trial cont.
1-14-77		Trial cont. Trial concluded. Jury verdict for the pltff in amt. of $60,000.00 compensary damages; $200,000.00 punitive damages. Third party action dismissed by the Court.
1-20-77		Filed notice of motion for order to reduce award of punitive damages ret. 1-27-77 at 12 PM.
1-20-77		Filed memo of law in support of defts mmotion to reduce damages.
1-24-77		Filed trial memo on behald of Cities Service Oil Co.
2-2-77		Filed memo endr on motion dated 1-20-77....Although leave was granted to Cities Service to bring the question of excessiveness of the jury's award of punitive damages, no precedents are called to my attention which suggest its excessiveness, and having in mind the record upon which the jury based its award, I cannot conclude as a matter of law that it was excessive. The motion to reduce is denied. So ordered. Owen J. m/n
2-2-77		Filed judgment # 77,244 ... ordered that pltt recover of deft Cities Service in amt of $273,940.00 with interest from 1-14-77 with cost when taxed and that third party deft MGO and Monticello Gas & Oil have judgment against deft dismissing the third party compliant. Owen J. Judgment ent. Clerk 2-3-77 m/n
2-22-77		Filed order that execution of and proceedings to enforce the judgments be and the same hereby are stayed until the disposition of appeal. Owen J.
3-2-77		Filed notice of appeal to the USCA from order of J. Owen of 2-2-77 m/n
3-23-77		Filed transcript of record of proceedings, dated 1-3,4,5-77
3-23-77		Filed transcript of record of proceedings, dated 1-11,12,13,14-77
4-11-77		Filed notice that the Original Record on appeal has been certified and transmitted the the U.S.C.A.
4-12-77		Fld transcript record of proceddings dtd: 1/3/77

A-4

SUMMONS

SUMMONS IN A CIVIL ACTION (Formerly D. C. Form No.)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Received 3/26/73 1:30

CIVIL ACTION FILE NO. 73 CIV 909

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff

v.

CITIES SERVICE OIL CO., a Delaware Corporation,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon GERALD ORSECK, ESQ.

plaintiff's attorney , whose address is Orseck Law Offices
10 Chestnut Street
Liberty, New York 12754
Tel: 914 292-5600

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ THOMAS E. ANDREWS Acting
~~Clerk~~ of Court

/s/ P. DUCKSON
Deputy Clerk

Date: New York, New York
February 26, 1973

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

VERIFIED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

-against-

CITIES SERVICE OIL CO., a Delaware Corporation,

Defendant.

----------X

73 CIV

VERIFIED COMPLAINT

Plaintiff demands trial by a jury of twelve.

Plaintiff, as and for its verified complaint, and by its attorneys, the undersigned, respectfully alleges as follows:

I

A. Plaintiff is a New York Corporation having its principal place of business in the Village of Monticello, Town of Thompson, County of Sullivan, State of New York, within the Southern District of the State of New York.

B. Defendant is a Delaware Corporation having a place of business at 104-70 Queens Boulevard, Forest Hills, City of New York, Borough of Queens, and State of New York.

C. That the subject matter of the controversy involved in the within action is in excess of Ten Thousand ($10,000.00) Dollars; to wit, the sum of One Hundred Thiry Seven Thousand Five Hundred ($137,500.00) Dollars.

D. That this court has jurisdiction over the parties and over the subject matter of this action on the basis of (i) diversity of citizenship, and (ii) a controversy, the subject matter of which is in excess of Ten

Thousand ($10,000.00) Dollars.

(28 USC Sec. 1332(a).

II

A. That heretofore, and at all times mentioned herein, plaintiff was and presently is the owner of real property, appurtenances, and improvements located on the easterly side of Cold Spring Road in the Town of Thompson, County of Sullivan, State of New York, and within the Southern District of the State of New York.

B. The aforesaid real property consists of 25.6± acres, and is more particularly described by metes and bounds in that deed made by one Harry J. Ruthoser to the plaintiff, and which was recorded on July 14, 1965, in the Office of the Clerk of Sullivan County, in Liber 697 of Deeds at page 126 thereof.

C. That plaintiff's real property consists, amongst other things, of a bungalow colony, in which bungalows are rented to the public for summer occupancy, together with the use of two lakes for fishing and boating, and together with the use of other facilities thereat.

D. That plaintiff's property has been so utilized from 1965 to and including the present time.

III

A. That heretofore, and at all times mentioned herein, defendant was and presently is the owner of real property, appurtenances, and improvements located on the westerly side of Cold Spring Road, in the Town of Thompson, County of Sullivan, State of New York, and within the Southern District of the State of New York.

B. That defendant's real property, with the consent, acquiescence, knowledge, participation, and cooperation of the defendant, consists of, and is utilized as, a fuel oil storage depot.

C. That, further, there are personal properties, fixtures, oil storage tanks, and other chattels and fixtures, owned by the defendant, systematically used in conjunction with and upon the aforesaid real property, with the acquiescence, knowledge, participation and cooperation of the defendant, in the operation of a fuel storage depot.

IV

A. That plaintiff's lands, described in allegation II hereof, are located opposite, but to the South, of the defendant's lands described in allegation III thereof.

B. That defendant's real property, and the fixtures and personal property thereon, with the consent, acquiescence, knowledge, participation and cooperation of the defendant, have been utilized from 1965 to and including the present time in such a manner so as to cause and permit fuel oil, wastes and other pollutants to be discharged from defendant's property on to and under the aforesaid Cold Spring Road, and, further, to flow on to and into the plaintiff's property.

V

AS A FIRST CAUSE OF ACTION
IN NUISANCE

A. That defendant's conduct, as above described, did and does now constitute a nuisance.

B. That as a result thereof, plaintiff's property has been rendered unfit for use.

C. That as a further result thereof, plaintiff has been damaged from 1965 to April 25, 1972 in the sum of $12,500.00; and from April 25, 1972 plaintiff has sustained permanent damages by way of diminution of value of its property, in the sum of $100,000.00, no part of which has been paid by defendant to plaintiff except the sum of $12,500.00 as for plaintiff's damages from 1965 to April 25, 1972.

VI

AS A SECOND CAUSE OF ACTION
IN TRESPASS

A. That defendant's conduct, as above described, did and does now constitute a trespass.

B. That as a result thereof, plaintiff's property has been rendered unfit for use.

C. That as a further result thereof, plaintiff has been damaged from 1965 to April 25, 1972, in the sum of $12,500.00; and from April 25, 1972, because of the continued trespass by defendant upon plaintiff's property as described herein, which trespass plaintiff believes will be continuous and permanent in the future, plaintiff has sustained permanent damages by way of diminution of value of its property in the sum of $100,000.00, no part of which has been paid by defendant to plaintiff except the sum of $12,500.00 as for plaintiff's damages from 1965 to April 25, 1972.

VII

AS A THIRD CAUSE OF ACTION
IN NEGLIGENCE

A. That defendant's conduct, as above described, did and does now constitute negligence.

B. That as a result thereof, plaintiff's property has been

C. That as a further result thereof, plaintiff has been damaged from 1965 to April 25, 1972, in the sum of $12,500.00; and from April 25, 1972 plaintiff has sustained permanent damages by way of diminution of value of its property, in the sum of $100,000.00, no part of which has been paid by defendant to p;aintiff except the sum of $12,500.00 as for plaintiff's damages from 1965 to April 25, 1972.

D. That plaintiff is free from contributory negligence.

VIII

AS A FOURTH CAUSE OF ACTION
IN CONJUNCTION WITH THE FIRST
CAUSE OF ACTION IN NUISANCE

A. That as a result of the nuisance described herein, plaintiff has suffered and will suffer consequential damages in the sum of $12,500.00 since April 25, 1972, no part of which has been paid by defendant to plaintiff.

IX

AS A FIFTH CAUSE OF ACTION
IN CONJUNCTION WITH THE
SECOND CAUSE OF ACTION IN
TRESPASS

A. That as a result of the trespass described herein, plaintiff has suffered and will suffer consequential damages in the sum of $12,500.00 since April 25, 1972, no part of which has been paid by defendant to plaintiff.

X

AS A SIXTH CAUSE OF ACTION
IN CONJUNCTION WITH THE
THIRD CAUSE OF ACTION IN
NEGLIGENCE

A. That as a result of the defendant's negligence described herein, plaintiff has suffered and will suffer consequential damages in the sum of $12,500.00 since April 25, 1972, no part of which has been paid by defendant to plaintiff.

XI

AS A SEVENTH CAUSE OF ACTION IN CONJUNCTION WITH AND IN ADDITION TO ALL OF THE FOREGOING CAUSES OF ACTION HEREIN, AND FOR PUNITIVE AND EXEMPLARY DAMAGES

A. That the acts and conduct of the defendant herein described were and are wanton, deliberate, reckless, illegal, malicious, and in total and purposeful disregard of plaintiff's rights.

B. That the acts and conduct of the defendant constitute numerous violations of the statutes, ordinances, and regulations of the State of New York, and many of its departments and submunicipalities; that said violations are likewise a result of wanton, deliberate, reckless, illegal, malicious, and purposeful acts of the defendant.

C. That as a result of all of the foregoing, plaintiff has incurred large expenses for engineering services, inspections, and for legal fees.

D. That defendant owns and operates many and numerous other fuel storage depots in the State of New York, in other states, and, upon information and belief, throughout the world.

E. That as a result of all of the allegations of this complaint, and of this cause of action, and for the further compensation of this plaintiff, and to deter the defendant from acting similarly in other places and in other

circumstances, plaintiff is entitled to punitive and exemplary damages in the sum of $25,000.00.

XII

AS AN EIGHTH CAUSE OF ACTION, TO TERMINATE AN AGREEMENT BETWEEN THE PARTIES ENTERED INTO ON APRIL 25, 1972.

A. That heretofore, and on April 25, 1972, the plaintiff, defendant, and one MGO Corp. entered into an agreement, a true copy of which is annexed hereto, made part hereof, and marked exhibit "A".

B. That said agreement was entered into as the result of, and as part of, an action then pending in the State Court, that is, Supreme Court of the State of New York, Sullivan County, entitled "Doralee Estates, Inc., plaintiff, against MGO Corp. and Cities Service Oil Co., defendants".

C. That defendant Cities Service Oil Co. has in all respects broken, repudiated, and violated the aforesaid agreement.

D. That plaintiff has done all that was required by it to be done by virtue of the terms thereof.

E. That as a result thereof, plaintiff is entitled to consider that agreement terminated, except that it acknowledges payment to it by or on behalf of defendant Cities Service Oil Co., of the sum of $12,500.00 for plaintiff's damages from 1965 to April 25, 1972.

WHEREFORE, plaintiff demands judgment against the defendants as follows:

FIRST CAUSE OF ACTION, IN NUISANCE, in the sum of $100,000.00;

SECOND CAUSE OF ACTION, IN TRESPASS, in the sum of $100,000.00;

THIRD CAUSE OF ACTION, IN NEGLIGENCE, in the sum of $100,000.00;

FOURTH CAUSE OF ACTION, in the sum of $12,500.00;

FIFTH CAUSE OF ACTION, in the sum of $12,500.00;

SIXTH CAUSE OF ACTION, in the sum of $12,500.00;

SEVENTH CAUSE OF ACTION, PUNITIVE DAMAGES, in the sum of $25,000.00;

making in all the sum of $137,500.00;

EIGHTH CAUSE OF ACTION, setting aside agreement of April 25, 1972, on account of non-compliance by defendant;

together with such interest as may be proper, and with the costs, disbursements, and expenses of this action.

Dated: Liberty, New York
February 28, 1973

Yours, etc.,

ORSECK LAW OFFICES

by:
Attorneys for Plaintiff
Ten Chestnut Street
Liberty, New York 12754
Tel: 914 292-5800

RSECK LAW OFFICES
10 CHESTNUT STREET
BERTY, NEW YORK 12754

STATE OF NEW YORK)
) ss:
COUNTY OF SULLIVAN)

DORA HUSS, being duly sworn, deposes and says that she is the President of Doralee Estates, Inc., the corporation named in the within entitled action; that she has read the foregoing and knows the contents thereof; and that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by Doralee Estates, Inc. is because the said Doralee Estates, Inc. is a New York Corporation and dependent is an officer thereof, to wit, its President.

/s/ DORA HUSS
DORA HUSS

Sworn to before me, this 28th
day of February, 1973.

/s/ DONALD ORSECK

DONALD ORSECK
Notary Public, State of New York
Sull. Co. Clerk's #1066
Comm. Expires March 30, 1974

ORSECK LAW OFFICES
10 CHESTNUT STREET
LIBERTY, NEW YORK 12754

EXHIBIT "A" TO VERIFIED COMPLAINT - STIPULATION OF SETTLEMENT

STIPULATION OF SETTLEMENT

DORALEE ESTATES, INC.,

Plaintiff,

-against-

MONTICELLO GAS & OIL CO., INC.,
and CITIES SERVICE OIL CO.,

Defendants.

It is hereby stipulated and agreed by and between the attorneys for the respective parties in this action,

that the cause of action brought in this equity action on behalf of the plaintiff for money damages for alleged nuisance and negligence is settled and discontinued upon its merits upon the payment by the defendants to the plaintiff corporation the sum of $12,500. This payment of $12,500 by the defendants to the plaintiff settles and compromises and extinguishes any and all claims that the plaintiff has or might have or will have against these defendants for the alleged nuisance and negligence from the date of the purchase of these premises by the plaintiff to the present date, April 25, 1972.

It is further stipulated and agreed by and between the attorneys for the respective parties in consideration of the aforementioned payment in the amount of $12,500 that the plaintiff herein and its successors and assigns and its officers and directors individually shall forbear commencing any suit against the defendants, their successors and assigns and waive any rights to any claims against the defendants herein by reason of the operation of their said premises as a bulk oil distribution plant and gas distribution depot on and all facilities now used in relation thereto for a period of six months commencing on the date hereof, April 25, 1972, and terminating on the 24th day of October, 1972, provided that defendants comply with the terms of this stipulation hereinafter set forth regarding a correction of their premises, pursuant to a plan to be submitted to the Court for approval.

It is further stipulated and agreed by and between the attorneys for the respective parties that within 60 days from the date hereof, the defendants shall submit to the Court plans and specifications for the installation of a system which will be designed to eliminate the discharge or run-off of any petroleum products from the defendants' premises onto the lands or lakes of the plaintiff, a copy of said plans and specifications to be supplied to the attorneys for the plaintiff at the same time.

It is further stipulated and agreed that upon submission of such plans and specifications to the Court, the Court shall have the opportunity to approve or disaprove of the same as it sees fit and upon the Court's approval of the same, and within 60 days thereafter, the defendants undertake and agree to commence work to institute the improvements called for by such plans and specifications, which work shall be carried out in an expeditious fashion in accordance therewith.

It is further stipulated and agreed between the parties hereto that the foregoing obligation to prepare and submit plans and construct the same shall be voided in the event that the defendants herein abandon the use of the premises for the purposes of distribution of bulk fuel oil products.

It is further stipulated and agreed that the said sum of $12,500 shall be paid by defendants to plaintiff by drafts or checks payable to the order of Oppenheim and Drew and Doralee Estates, Inc. within 30 days from the date hereof, failing which payment the plaintiff shall have the right to enter judgment in such amount together with the costs and disbursements of this action.

It is further stipulated and agreed that out of the sum of $12,500 so to be paid by the defendants, the sum of $7,000 is paid by and on behalf of defendant Cities Service and the sum of $5,500 is to be paid by and on behalf of the defendant Monticello

either of said defendants not be paid within such 30 day period, then the right of the plaintiff to enter judgment shall be restricted to the amount not so paid by such defendant, such judgment to be entered against only such defendant together with costs and disbursements as against such defendant, and it is further stipulated and agreed by and between the attorneys for the parties hereto that this Court shall retain jurisdiction of this action with respect to the cause of action for a permanent injunction until such time as this Court renders its decision.

MR. KRIEGER: Mr. Pantel, have you heard all the terms and provisions of the proposed settlement and do you agree with the same on behalf of Monticello Gas and Oil?

A. Yes.

Q. And are you authorized to settle on behalf of said company?

A. I'm authorized, yes.

MR. McDERMOTT: Let the record further show that counsel for the defendant Cities Service Company has been in telephone communication contact this day with Mr. Russell H. Smith, Esq., general attorney for Cities Service Oil Co. in Tulsa, Oklahoma and said Russell H. Smith has authorized counsel for Cities Service Oil Co. to enter into the foregoing stipulation.

(At which time Mr. and Mrs. Huss entered Chambers)

BY THE COURT:

Now, if you would, please, we have tried to knock out a stipulation of agreement and would you please listen.

(The foregoing stipulations of settlement were read.)

Now, Mrs. Huss, as president of Doralee Estates, Inc. you have just heard read to you the stipulations and agreements by your lawyer and the lawyers for the defendants. Do you consent and agree to the terms and conditions set forth in this stipulation?

A. Yes.

A-18

THIRD-PARTY SUMMONS

THIRD-PARTY SUMMONS IN A CIVIL ACTION CIV. 22 A a (9-64)

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 73 Civ. 907

DORALEE ESTATES, INC., a New York corporation,

Plaintiff

v.

CITIES SERVICE OIL COMPANY, a Delaware corporation,

Defendant and Third-Party Plaintiff

v.

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants

SUMMONS

To the above-named Third-Party Defendants:

You are hereby summoned and required to serve upon GERALD ORSECK, Esq.

plaintiff's attorney, whose address is Orseck Law Offices, 10 Chestnut Street, Liberty, New York 12754,

and upon BAER & MARKS,

who are attorneys for the above-named defendant and third-party plaintiff, and whose address is 70 Pine Street, New York, N. Y. 10005,

an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

Clerk of the Court.

By E. A. Becker
Deputy Clerk.

MAY 18 1973

Dated:

[Seal of Court]

Note.—This summons is issued pursuant to Rule 14 of the Federal Rules of Civil Procedure.

FPI NI—6-16-70-25M-4933

THIRD-PARTY COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - X

DORALEE ESTATES, INC., a New York corporation,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY, a Delaware corporation,

Defendant and
Third-Party Plaintiff

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants.

- - - - - - - - - - - - - - - - - - - X

73 Civ. 907

THIRD-PARTY COMPLAINT

1. Plaintiff, Doralee Estates, Inc., has filed against defendant, Cities Service Oil Company, a complaint, a copy of which is attached hereto as Exhibit A.

2. By written agreement dated January 28, 1965 between third-party plaintiff and third-party defendant MGO Corp., the latter agreed to defend, indemnify and save harmless the third-party plaintiff from any and all claims, demands, suits, actions, judgments and recoveries for and on account of damage or injury to property caused by or due to the condition or use of said premises.

3. The third-party defendant Monticello Gas & Oil Co., Inc. has used the premises referred to in the complaint and has directed and controlled the use thereof by the defendant MGO Corp.

4. By written agreement dated March 3, 1969 between third-party plaintiff and the third-party defendants, the latter agreed to defend, indemnify and save harmless the third-party plaintiff from any and all claims, demands, suits, actions, judgments and recoveries for and on account of damage or injury to property caused by or due to the condition or use of said premises.

5. At all times referred to in the complaint of the plaintiff against the defendant and third-party plaintiff herein, the third-party defendants were in possession and control of the oil plant premises referred to in the complaint.

6. By reason of the circumstances alleged above, the third-party plaintiff is and will be entitled to recover from said third-party defendants any sums which the plaintiff herein may recover from the defendant-third-party plaintiff, together with attorneys fees and expenses.

WHEREFORE the defendant-third-party plaintiff, Cities Service Oil Company, demands judgment against the third-party defendants for all sums that may be adjudged

in favor of plaintiff against the defendant, Cities Service Oil Company, together with all sums expended by Cities Service Oil Company for attorneys fees and expenses in defending against the complaint herein.

BAER & MARKS
Attorneys for Defendant-Third-Party Plaintiff, Cities Service Oil Company

By_____
A member of the firm

Office & P. O. Address
70 Pine Street
New York, New York 10005
Tel. No. 212 422-4910

EXHIBIT A TO THIRD-PARTY COMPLAINT - VERIFIED COMPLAINT (reproduced herein at pages A-5 - A-17)

VERIFIED ANSWER TO COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -X

DORALEE ESTATES, INC., a New York corporation,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY, a Delaware corporation,

Defendant.

- - - - - - - - - - - - - - - - - - -X

73 Civ. 907

ANSWER

CITIES SERVICE OIL COMPANY, by Baer & Marks its attorneys, answers the complaint as follows:

1. Denies so much of paragraph I. B. of the complaint as alleges the defendant to have an office at 104-70 Queens Boulevard, Forest Hills, New York.

2. Denies the allegations of paragraphs of the complaint numbered I. C. and I. D., IV. D., V. A., V. B. and V. C., VI. A., B. and C., VII. A., B., C. and D., VIII. A., IX. A., X. A., XI. A., B., C., and E., XII. C. and D.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragragh II. A., B., C. and D.

4. Denies the allegations of paragraph XI. D. of the complaint, except insofar as it alleges that

defendant owns and operates other fuel storage depots.

5. Denies the allegations of paragraph XII E. of the complaint, except insofar as it acknowledges payment by or on behalf of the defendant to the plaintiff of the sum of $12,500 for plaintiff's damages.

AS AND FOR A FIRST DEFENSE

6. The complaint fails to state a claim against defendant on which relief can be granted.

AS AND FOR A SECOND DEFENSE

7. The plaintiff, on April 27, 1972, executed and delivered to the defendant a general release from all liability alleged in the complaint herein.

AS AND FOR A THIRD DEFENSE

8 The right of action set forth in the complaint did not accrue within three years before the commencement of this action or within such other period of limitations as is applicable by law.

WHEREFORE, defendant prays judgment dismissing

the complaint and granting defendant the costs and disbursements of the action as against the plaintiff.

Dated: New York, N. Y.
May 18, 1973

Yours, etc.

BAER & MARKS
Attorneys for Defendant

By _____
A member of the firm

Office & P. O. Address
70 Pine Street
New York, New York 10005
Tel. No. 422-4910

TO: GERALD ORSECK, Esq.
Attorney for Plaintiff
10 Chestnut Street
Liberty, New York 12754
Tel. No. 914 292-5800

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

GEORGE H. COLIN, being duly sworn, deposes and says:

I am an attorney-at-law associated with the firm of Baer & Marks, attorneys for the defendant herein. I have read the foregoing Answer and know the contents thereof. The same is true to my knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The source of my information and the grounds of my belief with respect to the matters therein stated to be alleged on information and belief are documents and reports in my file and statements made to me by representatives of the said defendant.

The reason that this verification is made by deponent and not by defendant, is that said defendant is a foreign corporation, none of whose officers is within the County of New York where its attorneys maintain their office for the practice of law.

George H. Colin

Sworn to before me this
day of May, 1973.

RUTH SHOCHELESS
Notary Public, State of New York
No. 3[illegible]
Qualified in Nassau County
Cert. filed in New York County
Commission Expires March 30, 196[illegible]

ANSWER TO THIRD-PARTY COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY, a Delaware Corporation,

Defendant and Third Party Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third Party Defendant,

----------x

73 CIV. 907

THIRD PARTY DEFENDANTS DEMAND TRIAL BY JURY

Answer

The Third Party Defendants, MGO CORP. and MONTICELLO GAS & OIL CO., INC., herein by their Attorneys, GRUBBS & SUTERA for its Answer to the Third Party Complaint:

FIRST: Denies each and every allegation contained in paragraphs marked "2", "3", "4", "5" and "6" of the Third Party Complaint.

SECOND: Denies having any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph marked "1" of the Third Party Complaint.

AS AND FOR A FIRST, SEPARATE, DISTINCT AND COMPLETE DEFENSE, THE DEFENDANTS MGO CORP. and MONTICELLO GAS & OIL CO., INC., ALLEGES UPON INFORMATION AND BELIEF:

THIRD: That the damages alleged to have been suffered by the plaintiff were due to the carelessness and negligence of the plaintiff which contributed to the accident as set forth in the Complaint, and further that the plaintiff did not exercise due care at the time of the alleged accident, and that such negligence and lack of due care contributed to the said accident.

AS AND FOR A SECOND, SEPARATE, DISTINCT AND COMPLETE DEFENSE, THE THIRD PARTY DEFENDANTS, MGO CORP. and MONTICELLO GAS & OIL CO., INC., ALLEGES UPON INFORMATION AND BELIEF:

FOURTH: That the damages alleged to have been sustained by the plaintiff were due wholly and solely to its own carelessness and negligence and want of due care, or through the carelessness and negligence on the part of some other person or persons not under the control of the third party defendants and were not caused by any carelessness or negligence on the part of the third party defendant.

WHEREFORE, the third party defendants demand judgment dismissing the Third Party Complaint herein with costs and disbursements.

GRUEBS & SUTERA
Attorneys for Third Party
Defendants MGO CORP. and
MONTICELLO GAS & OIL
CO., INC.

By: Emanuel J. Sutera
A Member of the Firm
Office & P.O. Address
10 Platt Street
New York, New York 10038

NOTICE OF MOTION TO INCREASE PUNITIVE DAMAGES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

-against-

CITIES SERVICE OIL CO., a Delaware Corporation,

Defendant.

(and a third-party action)----------X

73 CIV 907

NOTICE OF MOTION

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Gerald Orseck of even date, the plaintiff will make application to the Court at a Motion Term thereof, to be held on the 21st day of November, 1975, at the pretrial conference in this case at 10:15 in the forenoon of that day or as soon thereafter as counsel can be heard, for an order increasing the ad damnum clause of plaintiff's seventh cause of action in which it seeks punitive damages, from the sum of $25,000.00 to the sum of $200,000.00.

PLEASE TAKE FURTHER NOTICE that opposing papers if any be served upon the office of the undersigned at least three days prior to the return date of the motion.

Dated: Liberty, New York
November 10, 1975

Yours, etc.,

ORSECK LAW OFFICES

by: GERALD ORSECK
Attorneys for Plaintiff
Office & P.O. Address
Route Fifty-Two East
Liberty, New York 12754
Tel: (914) 292-5800

Orseck Law Offices
Route Fifty-Two East
Liberty New York 12754

AFFIDAVIT OF GERALD ORSECK, ESQ., FOR PLAINTIFF, IN SUPPORT OF MOTION TO INCREASE PUNITIVE DAMAGES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

-against-

CITIES SERVICE OIL CO., a Delaware Corporation,

Defendant.

(and a third-party action)

----------X

73 CIV 907

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK :
: SS.:
COUNTY OF SULLIVAN:

GERALD ORSECK, the undersigned and attorney for the plaintiff, makes the following statement and affidavit.

Plaintiff seeks, in this motion, pursuant to Rules 15a and 54c to amend its complaint merely to increase the ad damnum clause in its seventh cause of action -- a cause of action seeking punitive damages -- from the sum of $25,000.00 to the sum of $200,000.00.

The movant is not guilty of bad faith, is not acting for the purpose of delay; the defendant will not be unduly prejudiced; and the trial of the issues will not be unduly delayed by the granting of this motion.

As will be demonstrated in the accompanying memorandum of law:

(a) There is no legal requirement in a claim for punitive damages for the plaintiff to pray for any specific amount in the first place.

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Fifty-Two East
New York 12754

(b) There is not even a need to specifically request or pray for punitive damages in a complaint where the facts therein, if proven, make out a sufficient case therefor.

The time of this motion is of no import since no further investigation or preparation of any kind is required on the part of the defendants -- the Federal courts consistently grant motions to increase prayer for damages as late as the close of testimony and even after trial on a post-trial motion.

After extensive depositions and the marking of approximately 100 documents during discovery, it has been clearly ascertained that the defendant Cities Service Oil Co. ignored terms of an earlier consent judgment which prohibited it from polluting plaintiff's lakes; that defendant Cities Service Oil Co. ignored subsequent orders made by various New York State agencies directing it to cease polluting plaintiff's properties. Such actions continued for a long period of time even after the commencement of this action, thereby warranting amendment.

WHEREFORE, it is respectfully urged that plaintiff's motion be granted permitting the ad damnum clause in its seventh cause of action seeking punitive damages to be increased from $25,000.00 to $200,00.00.

Dated: Liberty, New York
November 10, 1975

GERALD ORSECK

Sworn to before me this 10th day of November, 1975.

Sharon J. McKune

SHARON J. MC KUNE
NOTARY PUBLIC STATE OF NEW YORK
SULLIVAN COUNTY #1662-1976
COMMISSION EXPIRES MARCH 30, 1977

Orseck Law Offices
Route Fifty-Two East
Liberty New York 12754

AFFIDAVIT OF ROBERT M. GRUBBS, ESQ., FOR THIRD-PARTY DEFENDANT, IN OPPOSITION TO MOTION TO INCREASE PUNITIVE DAMAGES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DORALEE ESTATES, INC.

Plaintiff

against

CITIES SERVICE OIL COMPANY,

Defendant and Third Party Plaintiff

against

MGO CORP. and MONTICELLO GAS & OIL CO., INC.

Third Party Defendants

----------x

73 CIV. 907
JUDGE OWEN

AFFIDAVIT IN OPPOSITION TO MOTION TO INCREASE PUNITIVE DAMAGES SOUGHT EIGHTFOLD

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROBERT M. GRUBBS, being duly sworn, deposes and says: That he is a member of the firm of GRUBBS, LEAHY & DONOVAN, Attorneys for the Third Party Defendants herein.

This Affidavit is submitted in opposition to the plaintiff's instant Motion to increase the relief sought by way of punitive damages eightfold; from $25,000 to $200,000.

Upon information and belief, this suit was commenced in March of 1973. In the plaintiff's Complaint, damages are sought to be recovered from the use of property commencing in 1965. The said Complaint also recites that there was a prior action pending in the State Supreme Court, Sullivan County which was

settled by Agreement dated April 25, 1972 under which the plaintiff acknowledged that he received a specified payment by the defendant and now seeks termination of that Agreement. The said Complaint seeks punitive damages in the sum of $25,000 and total damages in the sum of $137,500. The plaintiff's Complaint was dated February 28, 1973.

Upon information and belief, the defendant's Answer was interposed in May of 1973; thereafter depositions were completed in 1974 and this suit was placed on the Ready Trial Calendar of this Court and has remained there except for a short period during which it was dismissed because of the non-appearance of the plaintiff's counsel at a hearing. Upon informatin and belief, this suit is to come on for trial in the near future.

Upon information and belief, the plaintiff's instant motion to increase the punitive damages sought eightfold was received by this deponent's office on November 13, 1975 and was noticed for hearing on November 21, 1975.

To permit an eightfold increase in the relief sought under the circumstances of this suit would be highly prejudicial to the interests of this deponent's clients. This is so for the following reasons:

1. The plaintiff's Complaint was served more than 2½ years ago. The damages claimed allegedly commenced in 1965, some ten years ago. Upon information and belief, the defendant

permanently shut down the installation complained of in May 1973 and this deponent's clients had ceased doing business there some time before that date. Therefore, it can not fairly be denied that any punitive damages were known to the moving party long before the eve of trial and the plaintiff's instant motion is barred by laches and undue delay. (Decisions are cited in this deponent's Memorandum of Law).

2. If this deponent's clients had been timely advised of the magnitude of the punitive damages presently sought to be increased eightfold, it would have greatly influenced the nature and conduct of the client's representation and the nature and extent of the discovery required. It would have also alerted this deponent's clients of the magnitude of the exposure of their personal assets and under such circumstances, they may have preferred to have designated their own personal counsel to conduct or to participate in the defense of their personal assets. To have denied this deponent's clients the timely opportunity to make such decisions by amendment of the relief sought on the eve of trial after all discovery has been completed and long after the suit was placed on the Trial Calendar would be highly prejudicial to the preservation of their personal assets.

WHEREFORE, it is respectfully prayed that the plaintiff's instant motion be denied.

ROBERT M. GRUBBS

ROBERT M. GRUBBS

Sworn to before me this

18th day of November, 1975.

NOTARY PUBLIC, State of New York
No. 41-4512686

AFFIRMATION OF GEORGE H. COLIN, ESQ., FOR DEFENDANT, IN OPPOSITION TO MOTION TO INCREASE PUNITIVE DAMAGES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DORALEE ESTATES, INC.,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants.

----------X

73 Civ. 907 (RO)

AFFIRMATION

GEORGE H. COLIN solemnly affirms, under penalty of perjury:

1. I am a member of the Bar of the State of New York and of the firm of Baer & Marks, attorneys for the defendant, Cities Service Oil Company (hereafter Cities Service). I make this affirmation in opposition to the plaintiff's motion to increase its claim for punitive damages.

2. In this suit, which was commenced in March of 1973, the plaintiff seeks to recover damages allegedly caused by the use of property owned by Cities Service and occupied

and controlled by third-party defendants, MGO Corp. (MGO) and Monticello Gas & Oil Co., Inc. (Monticello). It is alleged that during the period commencing in 1965 and terminating in 1973, plaintiff's property was damaged by oil effluents emanating from the fuel terminal operated by MGO and Monticello. Plaintiff's original complaint seeks both compensatory and punitive damages.

3. Prior to the present action, a previous action based on the same grievances as are here alleged by plaintiff had been commenced in the State Supreme Court for Sullivan County. This action was settled by an agreement dated April 25, 1972. Under the terms of the agreement, plaintiff acknowledged that it had received a payment of $12,500 in satisfaction of all claims it may have had against the defendants in that action, MGO and Cities Service, for the period 1965 to 1972. Thus, it would appear that the instant action can afford recovery only for acts and damage between April 25, 1972 and the commencement of this action eleven months later. The fuel storage facility ceased operation in May of 1973, two months after the commencement of the present action.

4. During the entire period in question, Cities Service was neither the user, occupant nor operator of the fuel storage facility described in the complaint. I believe that because of the facts outlined above and the cases cited in defendant's memorandum of law in opposition to plaintiff's motion to amend, the plaintiff has failed to state a legally sufficient claim to punitive damages.

5. Since all of the acts which might possibly constitute the basis of a claim for punitive damages must have occurred between April 25, 1972 and May, 1973, and this suit was commenced in March, 1973, plaintiff must have been aware of all relevant facts relating to damage long before its instant motion. This is made clear by plaintiff's demand for $25,000 in punitive damages in its original complaint. The plaintiff has in no way sustained its burden of placing before the Court credible reasons for an eight-fold increase in the demand for punitive damages. The suggestion in plaintiff's affidavit that during the course of discovery it became more aware of Cities Service's malice than it was at the time it issued the complaint, is frivolous in light of the fact that Cities Service had nothing to do with the operation and

occupancy of the oil terminal. While plaintiff refers in its affidavit to documents which evidence this increase in the scope of Cities Service's malice, it fails to append copies of these alleged documents to its affidavit. There are not, and cannot be, documents or other proof which show acts on the part of Cities Service toward the plaintiff. This is for the simple reason that Cities Service had nothing to do with the operation of the plant.

WHEREFORE, I pray that the motion be denied in its entirety, that Cities Service be granted such other and further relief as may be just and proper.

Dated: New York, New York
November 21, 1975

s/

George H. Colin

REPLY AFFIRMATION OF GERALD ORSECK, ESQ., FOR PLAINTIFF, IN SUPPORT OF MOTION TO INCREASE PUNITIVE DAMAGES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

DORALEE ESTATES, INC.,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and
Third-Party
Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO. INC.,

Third-Party
Defendants.
----------X

73 Civ. 907 (RO)

REPLY AFFIRMATION

GERALD ORSECK solemnly affirms, under penalty of perjury:

1. This reply affirmation is made in further support of the plaintiff's motion to increase its ad damnum clause with respect to its cause of action for punitive damages. It is in reply to the opposing affirmation of George H. Colin dated November 21, 1975.

2. Mr. Colin would have the Court believe that pollution of the plaintiff's property ended in May of 1973. This is not so and on July 26, 1973, a consent order was made by the New York State Department of Environmental Conservation, a copy of which is annexed hereto and marked "Exhibit I," in which it was acknowledged that as of that date there was still pollution and oil spillage into the plaintiff's lakes in violation of the Public Health Law and Article 17 of the Environmental Conservation

Law, such violations being criminal, and certainly quasi-criminal in nature.

3. Schedule A to the consent order required that "all oil contaminated soil from the Cold Spring site" be removed and disposed of. It is the plaintiff's contention, and it will prove that for the sake of a few dollars saving, the defendant and its tenant did not remove more than a few inches of contaminated soil from its bulk tank and that to this date there is still seepage into the plaintiff's property and lakes.

4. During discovery, a lease agreement between the defendant and third party defendant was produced (Exhibit II annexed hereto). That lease provided, amongst other things, that:

> "The landlord's (Cities Service) employees and representatives shall at all times have the right to enter the demised premises for the purposes of inspection, alteration or repair..."

5. An inter-company letter obtained during discovery, dated April 8, 1973, from Cities Service L. C. Langbein to Cities Service R. G. Beck, a copy of which is annexed hereto and marked "Exhibit III," demonstrates that Cities Service knew all the time of the pollution and intentionally stayed away from the Department of Conservation hearings in an attempt to avoid responsibility. In that memo, Langbein told Beck that:

> "The fine was $500, which he expects us (Cities Service) to pay and the stipulation that the tanks be removed by June 1st and at least 6" of earth be removed and replaced by August 1st. Sam claims that if Citgo was represented the fine would have been much more, in fact the law provides up to $2500.00 per day."

6. On January 26, 1973, a Cities Service Oil Company inter-departmental memorandum entitled "Construction Requisition" (see Exhibit IV) stated as follows:

> "In 1966, a suit was brought against Monticello Gas & Oil and Cities Service for pollution of an adjoining lake and the resulting game fish destruction and loss of business by a summer resort hotel. The suit was settled in 1972 at a cost to us of $4500 plus legal and court fees. In addition, we are now under court order to either install an oil-water separator or cease operations. The cost of a separator is estimated at $46,000, and the removal of tanks and replacement of oil soaked soil, necessary if operations are stopped, would be approximately $7500.
>
> ...
>
> "Since we are being exposed to further damage claims by continued operation of this facility and since substantial expenditures would be required to remove the tanks and replace the saturated soil, we propose to sell all land and improvements to our distributor, Monticello Gas & Oil, for the sum of $1.00 along with written indemnification from further liability."

Thus, it is clear that Cities Service, as owner of the offending premises, was at all times aware of the continued pollution and of its duty to abate the same.

7. That Cities Service had the duty to abate the condition is shown in Exhibit V annexed hereto, agreements with independent contractors J. Aliseo Fuel Oil Co. and William Cooper & Sons, with whom Cities Service contracted to remove part of the oil-soaked soil on its property which was causing leaks into the plaintiff's lakes.

8. On August 8, 1973, a Cities Service inter-company memorandum

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Fifty-Two East
New York 10174

indicated that Cities Service "expended $6,500 in order to comply with the citation" (see Exhibit VI).

9. Since Cities Service knowingly participated in criminal or at least quasi-criminal acts -- violations of the Public Health Law of the State of New York and of the Environmental Conservation Law of the State of New York, they are prima facie liable for punitive damages to this plaintiff. The whole lesson or object of punitive damages is to deter the offender from committing the same act again. If punitive damages are not in an amount great enough to accomplish this, the payment of insufficient damages operates as a license to the offender to continue its illegal activity. To avoid that situation, and since the record, since discovery, indicates that Cities Service was a knowing participant in a criminal or quasi-criminal act, the plaintiff's motion should be granted.

Dated: Liberty, New York
December 1, 1975

GERALD ORSECK

Crack Law Office
ROUTE FIFTY EAST
LIBERTY NEW YORK 12754

EXHIBIT I TO ORSECK REPLY AFFIRMATION -

ORDER ON CONSENT

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 12 of the Public Health Law and Article 17 of the Environmental Conservation Law by	ORDER ON CONSENT
MONTICELLO GAS & OIL CO., INC. MONTICELLO, NEW YORK, SULLIVAN COUNTY Respondent	FILE NO.

The New York State Department of Environmental Conservation has documented a continuing discharge of oil from its plant in Monticello, Sullivan County, New York into the Doralee Lake, said discharge being in contravention of the standards adopted for and assigned to the waters of the State receiving such discharges and in violation of the Public Health Law and Environmental Conservation Law of the State of New York, and

Respondent having waived the right to a hearing in the manner presented by law and constructed the making and filing of the Order and agrees to be bound by the provisions, terms and conditions contained herein,

NOW, having considered this matter and being duly advised it is ORDERED:

I. THAT, upon service of this Order upon Respondent, Respondent shall either immediately cease and abate and thereafter keep abated all discharges of oil from its plant into the waters of the State in contravention of the standards adopted for and assigned to said waters receiving Respondent's oil or other effluents, or be bound as hereinafter provided.

II. THAT, all discharges by Respondent in contravention of the aforementioned standards shall constitute violations of the Public Health Law and the Environmental Conservation Law of the State of New York, however, an action for penalties for any such violations pursuant to law shall not be instituted by the Department for as long as Respondent adheres to and fully complies with the provisions hereinafter set forth and completes its water pollution abatement program as agreed to and as set forth in "Schedule A" of this order.

III. THAT the Respondent submit to the Department by-monthly statements on the fifteenth day of each second month commencing in the month after service of a conformed copy of this Order upon Respondent detailing the current status and the steps taken by the Respondent to effect compliance with the terms of this Order, said reporting shall continue up to and until such time as the Respondent shall have complied fully with all of the terms and conditions herein stated.

IV. THAT, should there be any unusual or extraordinary occurrences or deviation from normal operating procedures which does or may contribute to a violation of water quality standards or in any way create or contribute to a potentially hazardous condition, or violate any condition or provision of any permit heretofore issued to the Respondent by the Department or the Department of Health, the Respondent shall immediately notify the Department and, within ten (10) days after such occurrence, submit to the Department a report detailing the circumstances and causes of the occurrence, remedial actions and steps taken to prevent reoccurrence.

V. THAT, for the purpose of insuring compliance with this Order, duly authorized representatives of the State of New York shall be permitted access to inspect the waste treatment facilities being constructed, owned, operated and/or maintained by the Respondent for the purpose of inspecting the discharge therefrom of any liquid or refuse, to take samples of any discharge, liquid or refuse, and for the purpose of determining the status of compliance with the terms of this Order.

VI. THAT all reports and submissions herein required shall be made to the Department at 202 Mamaroneck Avenue, White Plains, New York 10602 and/or as may be specified to the Regional Engineer of the Department for the Region in which Respondent's plant is located.

VII. THAT Respondent pay the said fine of FIVE HUNDRED DOLLARS ($500.00) to the Department of Environmental Conservation within fifteen (15) days from receipt of a conformed copy of this Order upon him by registered or certified mail by forwarding same to the Department Region 3 Headquarters at 21 South Putt Corners Road, New Paltz, New York 12561.

VIII. THAT, no change in this Order shall be made or be effective except as may be specifically set forth by written Order of the Commissioner upon written application by the Respondent for the relief sought.

X. THAT the provisions, terms and conditions of this Order shall be deemed to bind Respondent, its officers, directors, agents, servants, employees, and assigns and all persons, firms and corporations acting under or for it, including but not limited to those who may carry on any or all of the operations now being conducted by Respondent.

DATED: Albany, New York
1973

HENRY L. DIAMOND, Commissioner
New York State Department of
Environmental Conservation

TO: Monticello Gas & Oil Co., Inc.
c/o Mr. Sam Green, Manager
Cold Spring Road
Monticello, New York 12701

CONSENT BY RESPONDENT

Respondent hereby consents to the making and entering of the foregoing Order without further notice and waives its right to a hearing herein.

MONTICELLO GAS & OIL CO., INC.

By_____

Title_____

Date_____

STATE OF)
) ss;
COUNTY OF)

On this day of ,1973, before me personally came to me known, who being by me duly sworn did depose and say that he resides in that he is the of the corporation described in and which executed the foregoing instrument; and that he signed his name as authorized by said corporation.

_____

_____
NOTARY PUBLIC

SCHEDULE A

1. On or before April 1, 1973 Monticello Gas & Oil Co., Inc. will no longer use the Cold Spring Road oil or gas storage site.

2. On or before June 1, 1973 the fuel oil, gas or kerosine storage tanks will be removed from the Cold Spring site. When these tanks are removed any remaining oil will be taken out and all due precautions will be taken to prevent spillage of remaining oil.

3. On or before August 1, 1973 remove all oil contaminated soil from the Cold Spring site and dispose of this soil in a sanitary landfill. Any accumulated oil in the existing oil trap must be removed when the soil is removed.

EXHIBIT II TO ORSECK REPLY AFFIRMATION - LEASE

CITIES SERVICE OIL COMPANY

LEASE TO TENANT

Property # 31-105-001

AGREEMENT made this 3rd day of March, 1969, between CITIES SERVICE OIL COMPANY, a Delaware corporation, with offices at 464 Hudson Terrace, Englewood Cliffs, New Jersey hereinafter called LANDLORD, and M. G. O. and Monticello Gas & Oil Co., Inc. of Cold Spring Road, Monticello, New York hereinafter called TENANT:

WITNESSETH THAT:

1. Landlord does hereby demise and lease unto Tenant, and Tenant does hereby hire and take from the Landlord the premises situated in Monticello, County ~~(Parish)~~ of Sullivan and State of New York, together with all buildings and improvements thereon, identified by Landlord's real estate records as Property Number 31-105-001, to be used by Tenant only as a *~~service station~~ tank station which premises are more particularly described as: Cold Spring Road Monticello, New York

Subject to any state of facts an accurate survey might show, to all mortgages and/or deeds of trust now or hereafter placed on the premises, and to all the terms, provisions and conditions of any lease or other arrangement under which Landlord holds said premises. And together with the following-described equipment located and installed on said premises:

QUANTITY	DESCRIPTION	AGREED VALUE

2. The term of this lease shall commence on the 1st day of June, 1969, and shall expire on the 30th day of June, 1969, ~~and shall automatically renew for successive three month periods unless terminated by either party upon ninety (90) days prior written notice to the other party prior to the end of the original term or any renewal period thereof, and thereafter upon ninety (90) days prior written notice prior to the end of any renewal period.~~ and to continue on a month to month basis.

3. Tenant shall make payment of rent to Landlord at the rate and in the amount and manner as follows; said rent being entirely allocated to the realty and fixed improvements thereon:

The sum of $300.000 per month, payable in advance on the first day of each month.

Fixed or minimum rent shall be paid on the first day of each month in advance. In the event that the term of this lease shall commence on a day other than the first day of a calendar month, the first payment of fixed or minimum rent is to include apportioned earned rent for any portion of the first calendar month of the lease, and the final payment hereunder shall be apportioned for that portion of the last calendar month during which the lease shall be in effect.

4. Tenant shall pay and discharge, as they become due, (a) all taxes (other than real estate taxes) affecting the demised premises and improvements, insurance premiums, other than for fire and extended coverage insurance on the improvements, license and permit fees, and all other charges affecting the demised premises and improvements and the occupancy and use thereof; and (b) all public utility charges, including all water, sewer, gas, electricity and telephone charges, which shall accrue during Tenant's occupancy of the premises.

* Strike out as appropriate

5. Tenant agrees to use the said premises, buildings and improvements only for the purpose of carrying on the business set forth in paragraph one (1) hereof and (except if Tenant is a Petroleum Wholesaler) to give his personal and full-time on-the-premises supervision to the conduct thereof. The Landlord does not warrant or represent that the demised premises may lawfully be put to the above or any other particular use. Tenant agrees to comply with all laws, rules, regulations and requirements of all governmental authorities having jurisdiction thereof in respect to Tenant's use and occupation of the premises. Tenant's acceptance of possession hereunder shall constitute an acknowledgment of the good and tenantable condition of the premises on the date of commencement of possession hereunder.

6. Tenant shall make no alterations or changes in the demised premises without first having obtained Landlord's written consent, and shall maintain the demised premises in good condition during the term of this lease, and shall, at the Tenant's own cost and expense, make all repairs of every nature and description, except structural, to the demised premises, and the sidewalks on which they abut, and return same to Landlord at the expiration or other termination of this lease in good order and condition, reasonable wear, tear and use excepted. In the maintenance of any porcelain enamel wall surfaces, tenant shall conform to cleaning and maintenance procedures specified by Landlord from time to time. Any buildings, improvements, additions and fixtures (except trade fixtures) erected or installed on the demised premises shall immediately when erected or installed be and become the property of the Landlord and shall not be removed from the premises unless the Landlord shall have given written notice to the Tenant to remove any or all of the same, in which event Tenant will remove such buildings, improvements, additions and fixtures as are specified in said notice, and will restore the portion of the premises affected by such removal to the same condition as at the time when possession was first delivered to Tenant. The Tenant agrees to prevent any lien or obligation from being created against or imposed upon the demised premises, and will discharge all liens or charges for services rendered or materials furnished in the course of making any repairs, alterations or improvements immediately after said liens accrue or said charges become due and payable, or else, on demand of the Landlord, the Tenant will furnish security satisfactory to the Landlord that such liens or charges will be duly paid or satisfied. The Landlord's employees and representatives shall at all times have the right to enter the demised premises for the purposes of inspection, alteration or repair, provided however, that this provision shall not be deemed to impose upon the Landlord any obligation to effect repairs.

7. In the event that the premises hereby demised shall be damaged or destroyed by fire or any other casualty at any time during the term hereof, the Tenant shall give immediate notice thereof to the Landlord, and the Landlord and Tenant shall have the option to terminate this lease as of the date of such damage by giving notice of election so to do. In the event that the Landlord shall elect to reconstruct or repair the premises and neither party shall elect to terminate this lease, it shall be deemed to be in full force and effect during such period of reconstruction or repair, except that rent hereunder shall be abated in proportion to the loss of use and occupancy which shall be suffered by the Tenant in respect of the demised premises during the period of reconstruction or repair.

8. Tenant agrees to defend, indemnify and save harmless the Landlord from any and all claims, demands, suits, actions, judgments and recoveries for or on account of damage or injury (including death) to property or person of himself, his family, servants, agents or any other person, firm or corporation, caused by or due to the condition or use of said premises or the streets or roads on which they abut.

9. If required by the Landlord, the Tenant shall effect and keep in effect, contractual liability insurance, insuring the liability assumed herein by the Tenant, in companies satisfactory to the Landlord, and in such amounts as may from time to time be established and required by the Landlord. The Tenant further agrees to deliver policies of insurance, or copies thereof, to the Landlord. Failure on the part of the Tenant to provide the Landlord with such insurance upon request, shall entitle the Landlord to consider this lease breached and at an end, or else the Landlord shall have the right to obtain the said insurance for the account of the Tenant, and to charge the cost thereof as additional rent hereunder payable by the Tenant, who shall make payment to the Landlord of such sums within ten (10) days after the Landlord shall mail its invoice therefor to the Tenant.

10. If at any time proceedings under the Bankruptcy law shall be instituted by or against Tenant, or if the Tenant shall make a composition with creditors, or make an assignment for the benefit of creditors, or take advantage of any insolvency law, or if execution shall issue against the Tenant or the Tenant's effects, or if a receiver or trustee shall be appointed for Tenant's property, or if the demised premises shall be used for a purpose other than as specified, or if this lease shall by operation of law pass to any person other than the Tenant herein named, or in the event of the death of Tenant, or the signatory hereof on behalf of a corporate Tenant, (other than a petroleum wholesaler), or if such signatory (other than a petroleum wholesaler) shall not be active full time in the operation of Tenant's business at the demised premises, or if for any reason the said service station premises shall not be open for operation for more than three consecutive days, throughout usual business hours, or if the Tenant shall default in the payment of any rent required to be paid hereunder or in the payment of any other indebtedness owing to Landlord, or if Tenant should breach any of the covenants or agreements to be performed by the Tenant hereunder or under any other agreement with Landlord, or in the event of the termination for any cause whatsoever of any sales or distributor agreement between the parties, the Landlord may, if Landlord so elects, at such time or any time thereafter, without notice or demand, forthwith terminate this lease and the term hereof, and enter upon and take possession of the demised premises, using all necessary means thereof without liability; or if (in the event the Landlord does not own the premises but holds same under a lease) the underlying lease is terminated for any reason whatsoever, or if the entire premises or such part thereof shall be taken by condemnation, or by conveyance in lieu thereof, as

[illegible] March 3, 1969 between CITIES SERVICE OIL [illegible], and [illegible]

and M. G. O. Corp & MONTICELLO GAS & OIL CO., INC. as *~~Landlord~~/Tenant at premises situate at

Cold Spring Road, Monticello, County of Sullivan, State of New York

Rider to Para. No. 1

Property 31-105-001
Cold Spring Road
Monticello, New York

EQUIPMENT	COST
1 - Pump house Block Building - Warehouse, Storage, Office, 2-bay garage	$ 31,335.
1 - Unloading pump	175.
1 - Motor for pump	250.
1 - 3" Smith Meter	175.
1 - 2" Smith Meter	75.
1 - 2"-2 Meter	75.
2 - Ingersol-Rand 5 HP pumps	526.
1 - 25,000 gal. storage tank	2,100.
1 - 23,000 gal. storage tank	1,900.
1 - 20,000 gal. storage tank	1,400.
1 - 10,000 gal. storage tank	800.
1 - 7,000 gal. storage tank	400.
2 - Oak Desks	115.
1 - Oak Typing Desk	45.
2 - Chairs	10.
4 - 4-Drawer filing cabinets	75.
1 - York Safe	75.
1 - Stand for Billing machine	---
1 - Burroughs Billing Machine	200.
6 - Fire extinguishers	210.
1 - Smithway 13 pump	250.
1 - HP chassis lube	225.
TOTAL	$ 40,416.

M. G. O. CORP. Tenant

[illegible] JP ~~Landlord~~

MONTICELLO GAS & OIL CO., INC. Tenant

[illegible] JP ~~Landlord~~

CITIES SERVICE OIL COMPANY Landlord

BY: [illegible] Title

Region Manager

*Strike One

[illegible] (7-62) 10M 7-62
(Use with 98 or 101 Lease form)

RIDER to Lease dated March 3, 1969 between CITIES SERVICE OIL COMPANY, as *Landlord/Lessor

and M. G. O. CORP. and MONTICELLO GAS & OIL CO, INC. as ~~Lessee~~/Tenant at premises situate at

Cold Spring Road, County of Sullivan, State of New York

Rider to Para. No. 6

Notwithstanding the provisions of Paragraph 6 hereof tenant shall perform all maintenance at the demised premises except structual; for purpose of this lease "structual maintenance" shall be interpreted to include repairs to or replacement of the roof, walls, partitions, sewers, and concealed plumbing and wiring, repairs to buildings; and replacement of surfaced sections of drives and parking areas. and major repairs to Bulk storage facilities and pumping facilities.

GJK. SS.

M. G. O. CORP. Tenant

Lessee

MONTICELLO GAS & OIL CO., INC. Tenant

CITIES SERVICE OIL COMPANY Landlord

BY: Region Manager Title

*Strike One

S.S.I. (7-62) 10M 7-62
(Use with SSI or 10M Lease form)

to render the balance of the premises, in Landlord's opinion, unsuitable for the use above set forth, or if any permits or licenses necessary to conduct or operate the premises for the purposes hereinabove specified are revoked (except for fault or default of the Tenant) by the governmental agency having jurisdiction, then, upon the occurrence of any of such events, the term of this lease shall forthwith terminate and expire with the same effect as though such earlier termination were the date originally fixed herein for the expiration of the term. Landlord shall, upon expiration or termination as in this paragraph provided, have the right to re-enter, re-possess and enjoy said premises, improvements and facilities, and Tenant hereby waives all statutory and other rights inconsistent herewith. Any such termination, expiration, re-entry or re-possession shall not affect any accrued rights of Landlord hereunder.

11. The Tenant, on paying the rental herein specified, and performing Tenant's agreements aforesaid, shall and may peaceably and quietly have, hold and enjoy said demised premises for the term aforesaid, provided, however, that this covenant shall be conditioned upon the Landlord's retention of title or interest in the demised premises.

12. This lease and the premises herein demised may not be assigned, pledged, mortgaged, transferred or sublet, nor turned over or made available for use or operation by others, either in whole or in part, by the Tenant in possession, without the prior written consent of Landlord.

13. ~~The Landlord may, upon this lease, conduct or permit the exercise of right of proceeding or combination of the demised premises and of proceeds or income derived therefrom, along with other rights and rights of the Landlord from the Tenant.~~

14. If the Tenant shall default in the payment of rent or other charges payable hereunder, Landlord may, where permitted by the law of the jurisdiction in which the demised premises are situate, proceed by distress and sale of the goods and chattels there found to levy the rent and such other charges; and all costs, expenses and officers' commissions, as well as attorney's fees equal to 15% of the amount due, shall be paid by the Tenant, and in such case all costs, expenses, commissions or other charges shall immediately attach to and become part of the claim of the Landlord for rent. Tenant hereby expressly waives in favor of Landlord the benefit of all present or future laws establishing any limitation as to the goods or chattels upon which distress or execution may be made, and releases Landlord of the obligation of proving or identifying such goods or chattels, and further waives the benefit of all laws relating to appraisement, condemnation or notice of sale of the goods or chattels distrained or executed upon, it being the purpose and intent of this provision that all goods and chattels of the Tenant, whether upon the demised premises or not, be liable to distress for rent, and subject to sale at any time after five days from said distraint, and in all events subject to execution, levy or sale in any proceedings to enforce a judgment for rent payable hereunder. The Tenant further waives the right to trial by jury in any action or proceeding instituted by the Landlord to obtain possession of the demised premises and, after having been dispossessed or ejected therefrom by process of law or otherwise, any right to redeem or recover the demised premises or to have a reinstatement or continuance of the lease, as well as all other rights with respect to the demised premises.

15. If rent and any charges herein reserved as rent shall remain unpaid when due, as herein provided, then (if permitted by the laws of the jurisdiction in which the demised premises are situate) the Tenant hereby empowers any prothonotary or attorney of any court of record to appear for Tenant in any and all actions which may be brought for ejectment and for rent or the charges reserved as rent, or either, to sign for Tenant an agreement for entering in any competent court an amicable action or actions for the ejectment of the Tenant or recovery of possession of the demised premises by Landlord, or the recovery of rent or other charges, and in said amicable actions to confess judgment against Tenant for possession of the demised premises, and for all or any part of the rent or other charges specified in this lease then remaining unpaid, including, at Landlord's option, interest and costs together with an attorney's fee equal to 15% of the amount due such confession to include release of all errors and waiver of the benefit of all laws and exemptions referred to in the preceding paragraph. Such authority shall not be exhausted by one exercise thereof, but judgment may be confessed as aforesaid from time to time as often as any of said rent or other charges reserved as rent shall fall due or be in arrears, and such powers may be exercised as well after the expiration of the original term, as before. The Tenant waives the right to trial by jury in any action or proceeding instituted by the Landlord to obtain possession of the demised premises.

16. In the event that the relation of the Landlord and Tenant shall terminate by cancellation or termination of this lease by Landlord pursuant to Paragraph 10 hereof, or by reason of the re-entry of the Landlord under the terms and covenants contained in this lease, or by ejectment of the Tenant by summary proceedings or otherwise, or after the abandonment of the premises by the Tenant, it is hereby agreed that the Tenant shall remain liable for, and shall pay in equal monthly payments, the rent or an amount measured thereby which accrues for the balance of the term if the rent reserved is on a monthly or annual basis. If the rent is on a gallonage basis, Tenant shall pay in monthly payments during the remainder of the unexpired term a sum equal to the average of the monthly payments made by Tenant to Landlord during the period of this lease that Tenant was in possession of the premises and made gallonage payments. The Tenant expressly agrees to pay as damages for the breach of the covenants herein contained, the difference between the rent reserved plus any expenses incurred by Landlord, legal or otherwise, in reletting the demised premises and the rent collected and received, if any, by the Landlord, during the remainder of the unexpired term. Such difference or deficiency between the rent herein reserved and the rent collected, if any, shall become due and payable in monthly payments during the remainder of the unexpired term, as the amounts of such difference or deficiency shall from time to time be ascertained; and the Landlord is authorized to effect such reletting for a term equal to or greater than the balance of the term herein demised, without prejudice to, or diminution of, the Tenant's liability herein provided, except to the extent that the Landlord shall credit such subsequent rent collections to the liability of the Tenant hereunder.

17. The acceptance of rent by the Landlord or the rendition of a rent bill shall not be deemed to constitute a waiver of any default by the Tenant in performing any of the terms, conditions or covenants hereof or a withdrawal of any notice of termination theretofore given hereunder.

18. [illegible]

19. [illegible]

20. Any notice given pursuant to the provisions of this lease shall be deemed sufficient if mailed to the address herein set forth for the party to which it is addressed or, in the event of written notice of change of address by either party to the other, to the address set forth in such written notice. Any notice given by mail shall be deemed effective as of the date of mailing. This shall be without prejudice to the right of either party to give written notice by any other means or of any right of Landlord to terminate this lease as herein provided.

21. This instrument contains the entire agreement of the parties, and there are no understandings, conditions, representations or warranties in respect of the subject matter hereof which are not incorporated herein. No amendment, modification, renewal or extension hereof, or of Tenant's tenure of the premises herein described, shall be effective unless in writing duly executed by the parties hereto.

22. This agreement shall not be binding on Landlord unless signed by a Vice President or Region Manager of Landlord.

DIVISION MANAGER	DATE	OPER./REC. MGR.	DATE		DATE

IN WITNESS WHEREOF, the parties hereto have executed and delivered this lease the day and year first above written.

CITIES SERVICE OIL COMPANY, (Landlord)

By: [illegible] (Vice President) (Region Manager) (Title)

[illegible] (Witness) [illegible] M. G. O. CORP. (L. S.) (Tenant)

MONTICELLO GAS & OIL CO., INC.

(Witness) [illegible] (L. S.) (Tenant)

*Strike out as appropriate.

EXHIBIT III TO ORSECK REPLY AFFIRMATION - INTER-COMPANY LETTER DATED APRIL 8, 1973 FROM L.C. LANGBEIN TO R.G. BECK

TO: Mr. R. G. Beck

cc Mr. R. G. Koch

FROM: L. C. Langbein

DATE: 8/73

SUBJECT: H. G. O. T/S.

MESSAGE:

Stopped in here on Friday afternoon. S. Greene was out but was reached on the phone. He ~~leader for me to wait and got there in about 30 minutes. He will write a summary of the meeting~~ attended and forward the copies of the telegram and the citation. At any rate the fine was ~~$500, which he expects us to pay and the stipulation that the tanks be removed by June 1st and~~ at least 6" of earth be removed and replaced by August 1st. Sam claims that if Citgo was ~~prosecuted the fine would have been much more, in fact the law provides upto $2500.00 per day.~~

Sam has one bid approximately $ 5000.00 to remove the tanks and the top 6" of soils, and then ~~ask where this soil we over can be safely dumped. The contractor who made out the new site~~ is interested and prefers to have the tanks removed by others. This two deals are the only ones Sam has to date and oddly enough does not know of any one else. I would think that ~~large junk from steel people would have a few contractors to do such work. The kicker is that~~ there is some gasolen in the tanks yet. The fuel has been removed but when I asked Sam if about other products and was evasive and told me to ask Sam. Sam said there was some gas, no ~~time will be lost in gas freeing. There are letters in the tanks which Sam will have removed,~~ but he feels that when the crane picks up the tanks at on end the product can be drained from the other end. He claims they could drain the tanks, I told him to put some water in to float ~~the product up to the drain-off, I assure the water anti freeze valves are not working.~~

In general from Sam's conversation it will take $6/7000 to comply with the citation of the ~~State Pollution Control Board. He said that they put him thru the wringer with questions. It~~ appears that they do not care to put pressure on Citgo only the operator. Sam pleaded ignorance and that he was only there a few years, the plant is 60/65 years old etc etc.

SIGNED

REPLY: ~~At any rate I can not think we are getting any bargain in giving this land to Sam~~ we are liable for all past sins and omission of Mgo and the predecessors. Especially when they need the land to round out the pieces they acquired next door to us, and they look to us to ~~pay all fines and costs to comply with the Illinois Anti-Pollution Committee.~~

If I am to be involved in anything here, I surely trust that I will be kept informed of any and all action pertaining this property.

~~The old plant has been torn down, the tanks were removed from the ground, the~~ ~~tanks are empty and still there, but I [illegible] gas from the small storage tank.~~

EXHIBIT III

SIGNED L.C. Langbein

DATE:

RETURN TO SENDER

4CER-35 SCM 4-70

EXHIBIT IV TO ORSECK REPLY AFFIRMATION - INTER-DEPARTMENTAL MEMORANDUM DATED JANUARY 26, 1973 ENTITLED "CONSTRUCTION REQUISITION"

CONSTRUCTION REQUISITION

REGION	AREA		
SERVING TANK STATION: Monticello	T/S # 5313		
PROPERTY NUMBER 31-105-001	COST CENTER # 4-3135313		
TITLE Sell Tank Station Monticello, N.Y.		DATE 1-26-73	

EXPENDITURES	CONSTRUCTION	EXPENSE	TOTAL
PRIOR YEARS			
THIS YEARS 19 73	R1		R1
FOLLOWING YEARS			
TOTAL EXPENDITURES	R1		R1
DIFFERENCE FROM PRECEDING CONCURRENCE			

	N. Y. REQ. #	A.F.E. NUMBER				AMOUNT (S)
			ST.			
INVEST		9-		4		
RETIRE	7306 00	9-	31	4	1517	R1
EXP.		9-		4		

EARNINGS BENEFITS AND CASH PRODUCTION	AMOUNT	RETURN ON EXPEND.
NET OPERATING INCOME BEFORE RESERVES		%
NET INCOME		%
CASH PRODUCTION CASH PAYOUT		YRS
PROFITABILITY INDEX		

SUMMARY OF REASONS FOR RECOMMENDING THIS WORK

In 1966, a suit was brought against Monticello Gas & Oil and Cities Service for pollution of an adjoining lake and the resulting game fish destruction and loss of business by a summer resort hotel. The suit was settled in 1972 at a cost to us of $4500 plus legal and court fees. In addition, we are now under court order to either install an oil-water separator or cease operations. The cost of a separator is estimated at $46,000, and the removal of tanks and replacement of oil soaked soil, necessary if operations are stopped, would be approximately $7500.

Maintenance costs were $5,000, $6,000, and $3,000 for 1970, 1971, and 1972, respectively. A substantial amount of work, estimated at $6,900, is needed to upgrade the warehouse office building. The distributor now occupying the property is paying $200 per month. He is building a new tank station and anticipates occupancy early this year.

Since we are being exposed to further damage claims by continued operation of this facility and since substantial expenditures would be required to remove the tanks and replace the saturated soil, we propose to sell all land and improvements to our distributor, Monticello Gas & Oil, for the sum of $1.00 along with written indemnification from further liability.

APPROVALS: DEPARTMENT	REGION	DATE	APPROVALS: GENERAL OFFICE	DATE
				1-26-73
	Prepared By G.O.Operations	1-26-73		1-26-73
SALES				
OPERATIONS				2-2-73

EXHIBIT V TO ORSECK REPLY AFFIRMATION - AGREEMENTS BETWEEN CITIES SERVICE AND INDEPENDENT CONTRACTORS

CHGO

AGREEMENT WITH INDEPENDENT CONTRACTOR No. M 32054

CITIES SERVICE OIL COMPANY

Monticello C/S 31-105-001

Location Cold Spring Rd., Monticello, N.Y. Date of Contract May 4 19 73

For and in consideration of the payments set out below, J. Alisco Fuel Oil Co., hereinafter called Contractor, has agreed and does hereby agree with CITIES SERVICE OIL COMPANY, hereinafter called Company, to do and perform the work hereinafter described, under the terms and conditions printed on reverse side hereof:

DESCRIPTION OF WORK TO BE DONE

To remove all oil soaked earth in the front yard of this plant that is oil soaked, carting same away and disposing of same in a safe manner.

to replace all oil soaked earth removed with clean bank run-earth and/or gravel.

This work to be completed on or before August 1, 1973

CONTRACT PRICE BASIS	ACCT. NO.	AMOUNT
In full upon satisfactory completion	43135313 X 4671.2	$ 1800.00

It is the intent of the parties hereto that the terms printed on the reverse side hereof will control irrespective of any subsequent execution of a work order, purchase order, receipt, or similar instrument by an employee, representative, or agent of Cities Service Oil Company.

CITIES SERVICE OIL COMPANY

By (Agent of Company)

J. Alisco Fuel Oil Co., (Contractor)

By

Mailing Address of Contractor Box. # 552, Monroe, N.Y. 10950

Contractor's Identification Nos. FOAB SUI State of

Taxpayer Identification Number 090-15-2-64

Contract Completed	Accepted By	Approved		
19	EXHIBIT V			

CONTRACTOR AGREES:

1. That his compensation for the work covered by this contract shall be due upon completion of the same to the satisfaction of the Company, and the furnishing to Company of good and sufficient evidence that all laborers performing labor and material men furnishing material, machinery, supplies, equipment, trucks, or other property of any kind whatsoever, used directly or indirectly in the performance of or in connection with said work have been fully paid for such labor, material, machinery, supplies, equipment, including sales and use taxes thereon, trucks or other property, including rentals or any other charge therefor, have been fully and finally paid, discharged and settled. It is further understood that in addition to any other right or remedy it may have, Company may deduct from any sums becoming due Contractor hereunder any and all sums due it for damage to the material and/or equipment hauled for it hereunder, or for damage due it for breach of this contract or any covenant thereof.

2. Contractor agrees to defend, indemnify, and hold Company harmless from all liability for damage to the person and/or property of all persons arising from the performance or non-performance of operations contracted herein and purchase or provide the following insurance:

(a) Insurance which shall comply with the Workmen's Compensation and Occupational Disease laws of the state or states in which the work is to be performed and Coverage B, Employers' Liability insurance with a minimum limit of $100,000. The purchase of commercial Workmen's Compensation insurance is not required if Contractor has state approval to carry as own risk.

(b) Public Liability insurance covering operations performed under the contract, including coverage for liability assumed in this agreement, with minimum damage limits of $25,000 for bodily injury to each person and $50,000 each accident and property damage of $25,000 each accident.

(c) Automobile Liability insurance covering all owned, non-owned, and hired motor vehicles used in connection with the work contracted with minimum damage limits of $25,000 for bodily injury to each person and $50,000 each accident and property damage of $10,000 each accident.

To furnish evidence of the above insurance to the Company.

That failure to comply with any of the provisions of this numbered paragraph 2 will entitle the Company to terminate this contract at any time and also to recover from the Contractor any payment or payments made by the Company, by reason of such failure.

3. To comply with all the Social Security Laws, both Federal and State, in force and effect on the date of this Contract, and to give reasonable proof of the same, and to protect the Company from any liability for any State or any Federal Social Security Tax or contribution arising from this contract.

4. It is further understood and agreed that Company shall have no power or authority to direct, supervise or control Contractor in the means, manner or method of performance of the work which forms the subject matter hereof, but that Contractor shall, in the exercise of his independent employment, select the means, manner and method of performance of such work, being responsible to Company solely for results obtained.

5. Failure to perform this contract by either party shall be excused when caused by fires, floods, strikes, Acts of God or other causes beyond the control of such party.

6. Contractor agrees to comply with the Walsh-Healey Act, the Fair Labor Standards Act and agrees that it will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

7. Contractor agrees to comply with the Nondiscrimination Provisions of Executive Order 11246, which are incorporated herein by reference.

8. That for audit and invoicing purposes:

(a) Contractor's records pertaining to charges made pursuant to this agreement will be subject to audit by representatives of Cities Service Oil Company.

(b) Invoices submitted for work charged on an hourly basis will be supported by work tickets showing description, date, and location of work performed and the names of employees and hours each worked. Contractor will retain supporting records for a minimum period of three years.

CONTRACT WITH INDEPENDENT CONTRACTOR

No. M 32063

CITIES SERVICE OIL COMPANY

Location [illegible] Montezuma Kan. Date of Contract 7-2 19 73

For and in consideration of the payments set out below, Cooper & Sons hereinafter called Contractor, has agreed and does hereby agree with CITIES SERVICE OIL COMPANY, hereinafter called Company, to do and perform the work hereinafter described, under the terms and conditions printed on reverse side hereof:

DESCRIPTION OF WORK TO BE DONE

Remove old cellar, fence, tires, debris etc.
Remove approximately 12" of oil soaked earth in areas as inspected, generally a line from gasoline tank on North side and from wellhead to front gate on South side. Remove as much as possible by grading, dispose of all material removed. Haul contaminated earth away. Fill with clean earth with same approximate grade. This confirms operations witnessed on site 7-12-73 by Jim Green Eng. Co. and LE Lawson.

CONTRACT PRICE BASIS	ACCT. NO.	AMOUNT
Lump sum bid upon satisfactory completion	4313 5313 X 4673.2	$2500.00

It is the intent of the parties hereto that the terms printed on the reverse side hereof will control irrespective of any subsequent execution of a work order, purchase order, receipt, or similar instrument by an employee, representative, or agent of Cities Service Oil Company.

CITIES SERVICE OIL COMPANY

By L A Lawson (Agent of Company)

Cooper & Sons (Contractor)

By [illegible]

Mailing Address of Contractor [illegible] Montezuma Kan 67867

Contractor's Identification Nos. FCAB ..... SUI ..... State of .....

Taxpayer Identification Number 14-1324255

Contract Completed	Accepted By	Approved		
7/14 19	L A Lawson			

EXHIBIT V

92-20-16 37 4M (12-69) SDH 4-70 JOHCO

EXHIBIT VI TO ORSECK REPLY AFFIRMATION - INTER-COMPANY MEMORANDUM DATED AUGUST 8, 1973

August 8, 1973

Mr. P. J. Reardon

TO: Mr. P. J. Reardon

FROM: L. C. Langbein

SUBJECT: Property #31-105-001
Distributor Tank Station
Monticello, New York

As requested in Mr. Koch's letter of July 31st, I wish to advise that I have expended $6,500 in order to comply with the citation given to us by Mr. Same Greene. For the record only, I did not furnish Mr. Koch with M. G. O. Corp.'s offer to buy this property.

LCL:v

cc:Messrs. C. F. Tebo
D. O. Koch
R. F. Latshaw
R. H. Smith

MEMORANDUM AND ORDER GRANTING MOTION TO INCREASE PUNITIVE DAMAGES

Index No. 73 CIV 907 *Year 19*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

-against-

CITIES SERVICE OIL CO., a Delaware Corporation,

Defendant.

(and a third party action)

NOTICE OF MOTION AND SUPPORTING AFFIDAVIT

ORSECK LAW OFFICES
by: GERALD ORSECK
Attorneys for Plaintiff

ROUTE FIFTY-TWO EAST
LIBERTY, NEW YORK 12754
(914) 292-5800

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for.

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY — *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT — *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on 19 at M.*

Dated:

ORSECK LAW OFFICES
by:

Attorneys for

ROUTE FIFTY-TWO EAST
LIBERTY, NEW YORK 12754

To:

Attorney(s) for

MEMORANDUM and ORDER

The motion is granted. Bail v Cunningham 452 Fed 1 Cir (7th Cir 1971) and Quick v Montgomery Ward 284 App. Div. 36 (3rd Dept 1954) The amended answer shall be served within 15 days hereof. SO ORDERED

Jan 11, 1976

Pierson M. Hill
USDJ.

MICROFILMED

U.S. DISTRICT COURT
FILED
JAN 22 1976
S. D. OF N. Y.

N 912 CL
COPYRIGHT 1972 BY ALL STATE LEGAL SUPPLY CO.

THIRD-PARTY DEFENDANTS' REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DORALEE ESTATES, INC.

Plaintiff

against

CITIES SERVIE OIL COMPANY

Defendant and Third Party Plaintiff

against

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third Party Defendants

----------x

73 CIV. 907
JUDGE OWEN

REQUESTS TO CHARGE OF THE THIRD PARTY DEFENDANTS

Copy Received
5/7/76.
ROBERT M. GRUBBS,
Of Counsel

GRUBBS, LEAHY & DONOVAN
Attorneys for Third Party Defendants
Office & P.O. Address
27 Cedar Street
New York, New York 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

DORALEE ESTATES, INC.

Plaintiff

against

73 CIV. 907
JUDGE OWEN

CITIES SERVICE OIL COMPANY

Defendant and
Third Party Plaintiff

against

MGO CORP. and MONTICELLO GAS & OIL
CO., INC.,

Third Party Defendants

----------x

REQUESTS TO CHARGE OF THE
THIRD PARTY DEFENDANTS

The Third Party Defendants MGO CORP. and MONTICELLO GAS & OIL CO. INC. respectfully request the Court to give the Jury the following instructions:

1. The fact that the plaintiff claims an occurrence took place does not mean that the plaintiff is entitled to recover against the defendant since the mere happening of an occurrence is not proof of negligence.

2. It is the duty of the Jury to determine the facts from the evidence presented and not to be influenced or swayed by sympathy, emotions, favoritism or prejudice in reaching its verdict; and conjecture and speculations

are no substitutes for proof.

3. That the Court instructs the Jury on the questions of damages is not to be considered by the Jury as indicating that the plaintiff should recover any damages against the defendant since it is the duty of the Court to instruct the Jury as to the applicable law of damages in all cases that are decided by a Jury whether or not the plaintiff is entitled to recover any damages.

4. If the Jury finds that the evidence in this case is evenly balanced on any issue, then the plaintiff has not sustained its burden of proof and the Jury's verdict must be for the defendant on that issue.

5. The law imposes upon the plaintiff the burden of proving how the allegeddamages occurred and who was responsible for it. If the Juryfinds that the plaintiff has failed to establish by a preponderence of the evidence how the alleged damages occurred and who, if anyone, was responsible for it, it will be the duty of the Jury to bring in a verdict for the defendant.

6. It is a fundamental principle in the law of this State that in an action for a personal injury based on the negligence of the defendant, the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no

presumption arises from the happening of damage and proof of negligence on the part of the defendant, that the plaintiff was free from blame. (Reynolds v. New York Cent. & H.R.R. Co. 58 N.Y. 248; Weston v. City of Troy 139 N.Y. 281, 282, 34 N.E. 780; McNally v.Zeller Marine Corp. etal (1948) 77 F. Supp. 985).

7. Contributory negligence may consist not only in a failure to discover or appreciate a risk which would be apparent to a reasonable man, or an inadvertent mistake in dealing with it, but also in an intentional exposure to a danger of which the plaintiff is aware. In such cases, the plaintiff's conduct may be such as to indicate consent to encounter the danger and relieve the defendant of responsibility. (Restatement of Torts, Sec. 466, McGuire v. N.Y.Rys. Co. 230 N.Y. 23, 128 N.E. 905; Posser on Torts (1941) Pg. 400).

8. If the Jury finds that the plaintiff was in as good position as was the defendant to avoid the accident, it would be the duty of the Jury to bring in a verdict for the defendant.

9. If the Jury finds that the plaintiff's own neglect or lack of due care or prudence contributed to any extent, no matter how small, to the occurrence which it is claiming, it is the duty of the Jury to bring in a verdict for the defendant. (Baltimore & Potomic Railway Co. v.

William H. Jones 95 U.S. 439; McNally v. Zello Marine Corp. etal. 77 F. Supp. 985).

10. The plaintiff can not recover any remote, contingent, uncertain or speculative damages. (Weir v. Union R. Co. 188 N.Y. 416, 81 N.E. 168, 11 Ann Cas 43; Platt v. Third Avenue Company 29 App. Div. 388, 51 N.Y.S. 590).

11. The plaintiff can not recover damages in this suit for any claimed loss of profits in a commercial venture resulting from economic or market conditions, swamp conditions, discharge of wastes by others than the defendant, or any other condition not caused by the defendant. (Gombert v. New York Cent. & H.R.R. Co. 195 N.Y. 273, 88 N.E. 382, 133 AM St Rep. 794; Masterton v. Mt. Vernon 58 N.Y. 391).

12. In this jurisdiction, punitive and exemplary damages are not assessed as compensation to the plaintiff, but are only imposed by way of punishment to the wrongdoer and such damages are penal in their nature. A party who seeks punitive damages must establish malice, fraud or moral culpability of the defendant. (Gostkowski v. The Roman Catholic Church 262 N.Y. 320; Sanders v. Rolnick 67 N.Y.S. 2d 652, affirmed 71 N.Y.S. 2nd 892; Walker v. Sheldon 10 N.Y. 2nd 401, 179 N.E. 2nd 497).

13. If the Jury finds that the plaintiff and defendant dealt in good faith and that there was no evidence of malicious desire to injure the plaintiff, there can be no liability for punitive damages. (Gordon v. Nationwide Mutual Insurance Co. 37 A.D. 2nd 265; Boomer v. Atlantic Cement Co. 72 Misc. 2nd 834, affirmed 42 A.D. 2nd 496; Greiss v. Royal National Bank 31 N.Y. 2nd 10003, 293 N.E. 2nd 827).

Respectfully submitted,

GRUBBS, LEAHY & DONOVAN
Attorneys for Third Party
Defendants
Office & P.O. Address
27 Cedar Street
New York, New York 10038

ROBERT M. GRUBBS,
Of Counsel

PLAINTIFF'S REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY, a Delaware Corporation,

Defendant and Third Party Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third Party Defendant.
----------X

73 CIV 907

(JUDGE RICHARD OWEN)

PLAINTIFF'S REQUESTS TO CHARGE

ORSECK LAW OFFICES
BY: GERALD ORSECK
Attorneys for Plaintiff
Office & P. O. Address
Route Fifty-Two East
Liberty, New York 12754
Tel: (914) 292-5800

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With Respect to Plaintiff's Cause of Action for Damages on the Theory of "Private Nuisance"

(The plaintiff will request that the Court charge per New York Pattern Jury Instructions -- Civil, Volume II (PJI 3:16, a copy of which is appended hereto).

1. PRIVATE

PJI 3:16. Torts Other Than Negligence—Private Nuisance

1. While landowners in an organized community must suffer some damage, annoyance and inconvenience from each other, no one may make an unreasonable use of his land to the material injury of his neighbor's right to use and enjoy his land. When such an unreasonable use is made, the law designates it a private nuisance and permits the injured neighbor to recover damages.

2. A plaintiff seeking to recover damages for private nuisance must show, first, that conduct of the defendant caused an interference with plaintiff's right to use and enjoy his land, second, that the interference was substantial, third, that defendant's conduct was intentional, and fourth, that defendant's conduct was unreasonable under all of the circumstances. Plaintiff in this case claims that defendant has unreasonably interfered with plaintiff's use of his land by [*state claimed interference*]. Defendant denies that his conduct caused any interference, denies that there has been any substantial interference and says that his use of his own property has at all times been reasonable. The burden of proving all of the elements of private nuisance that I have outlined for you is on plaintiff.

3. Unless you find that there was an interference with plaintiff's right to use and enjoy his land which was caused by defendant's conduct, your verdict must be for defendant. If you find that there was an interference that was caused by defendant's conduct, you must then consider whether the inconvenience was substantial. To be substantial, the interference must be real and appreciable, not fanciful or petty. The test is not what disturbs or annoys the plaintiff, but whether normal persons living in the locality would be appreciably annoyed or disturbed by the situation. Even though you find that there was an interference with plaintiff's use and enjoyment of his land, if you further find by applying the test I have given you that the interference was not substantial, your verdict will be for defendant. If, however, your finding is

that by that test there was a substantial interference, you will next consider whether defendant's conduct was intentional.

4. If you find that defendant acted for the purpose of causing interference with plaintiff's use and enjoyment of his land, or that though he did not he (knew that such interference was substantially certain to result from his conduct, became aware that his conduct was causing such interference and nevertheless continued it) your finding will be that defendant's conduct was intentional. If you find that defendant's conduct was not intentional, your verdict will be for defendant. If you find that defendant's conduct was intentional, you will next consider whether defendant's conduct was under all the circumstances unreasonable.

5. It is in the public interest that each landowner be left free to make lawful use of his property to the fullest possible extent consistent with the enjoyment by other landowners of use of their property free from unreasonable interference. Thus whether particular conduct constitutes a nuisance is a question of degree, in which the necessity for and the utility and social value of defendant's conduct must be weighed against the gravity of the harm to plaintiff resulting from that conduct. In determining whether defendant's conduct was unreasonable, you must consider all of the circumstances including ([*use such of the following as are warranted by the evidence:*] the character of the neighborhood, the location of the properties, the nature and purpose of defendant's use and its value to the community, whether defendant's use was begun before or after plaintiff began occupancy of his property, the nature, extent and frequency of the interference with plaintiff's use, whether the interference can be avoided or lessened without undue hardship to defendant). No one of the circumstances that I have mentioned is conclusive, but all are to be considered together and in relation to all of the surrounding circumstances. If you find that defendant's conduct was not under all the circumstances unreasonable, your verdict will be for defendant. If, however, you find that there was an interference with plaintiff's right to use

and enjoy his land, that the interference was caused by defendant's conduct, that it was substantial, was intentionally caused and was unreasonable, as I have defined those terms for you, your verdict will be for plaintiff.

Comment

[*See also Introductory Statement, p 653, supra.*]

Based on Hogle v Franklin Manufacturing Co. 199 NY 388, 92 NE 794; McCarty v Natural Carbonic Gas Co. 189 NY 40, 81 NE 549; Davis v Niagara Falls Tower Co. 171 NY 336, 64 NE 4; Cogswell v N. Y. N. H. & H. R. R. Co. 103 NY 10, 8 NE 537; Campbell v Seaman, 63 NY 568; Hay v The Cohocs Company, 2 NY 159; Waters v McNearney, 8 AD2d 13, 185 NYS2d 29, affd 8 NY2d 808, 202 NYS2d 24, 168 NE2d 255; McKenna v Allied Chem. & Dye Corp. 8 AD2d 463, 188 NYS2d 919; and see Penal Law § 240.45; Prosser, Torts (3d Ed) 611, § 90; 1 Harper & James, The Law of Torts 64, §§ 1.23–1.30; Restatement, Torts, §§ 822–840. The pattern charge covers only intentional wrongdoing by defendant. Private nuisance may also be based on negligent conduct or abnormally dangerous activity. With respect to negligent and abnormally dangerous conduct, see Introductory Statement, supra, p 653.

The essence of private nuisance is interference with the use and enjoyment of land, Heeg v Licht, 80 NY 579; McKenna v Allied Chem. & Dye Corp. 8 AD2d 463, 188 NYS2d 919; Prosser, Torts (3d Ed) 611, § 90. It differs from trespass in that there need be no interference with possession, though some acts may interfere with both possession and use and enjoyment and thus constitute both nuisance and trespass, Burk v High Point Homes, 22 Misc 2d 492, 197 NYS2d 969, app dismd 11 AD2d 701, 205 NYS2d 862. The elements of the tort of private nuisance are (1) an interference, substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with plaintiff's property right to use and enjoy land, (5) caused by defendant's conduct. Whether plaintiff has the requisite property interest is a question of law for the court. The other elements will be questions for the jury, unless the evidence is undisputed. The pattern charge deals with each element that may present a jury question, although in many cases intention and causation will not be in dispute and the charge will have to be modified accordingly.

The burden of proof is upon plaintiff to establish all elements of the tort, 66 CJS 955, Nuisance § 149, including causation, Pawlowicz v American Locomotive Co. 90 Misc 450, 455, 154 NYS 768 and the unreasonableness under the circumstances of the interfer-

With Respect to Cause of Action for Trespass
(These charges substantially are per New York Pattern Jury Instructions -- Civil, Volume II (PJI 3:8)).

6. A defendant who, without justification or consent, knowingly pollutes or contaminates the lands of another commits a trespass and is liable for any damage sustained by reason of its conduct.

7. Plaintiff claims that the defendant Cities Service Oil Company certainly after April, 1972, had knowledge that oil and oil products spilled on Cities Service's land would ultimately find their way to the plaintiff's lands, lakes and waters.

8. Plaintiff further claims that notwithstanding such knowledge on the part of the defendant and after agreeing to cease and desist from causing oil and oil products t be spilled, thus polluting and contaminating the plaintiff's lands and waters, the defendant nevertheless continued to d so. The questions which you must determine with respect to plaintiff's claim against defendant Cities Service Oil Company for trespass are as follows:

First: Did the defendant's conduct cause the oil and oil products to enter plaintiff's lands and waters? If, in considering all of the testimony and proof in this

case, your finding is that the oil and oil products were not caused to enter plaintiff's land by defendant's acts, your verdict will be for the defendant on the issue of trespass. If, in considering that testimony and proof, your finding is that the defendant's acts did cause the oil and oil products to enter plaintiff's lands and waters, you will then consider whether defendant's acts were intentional.

Second: The next question, then, for you to determine is the matter of the defendant's intent. Intent involves the state of mind with which an act is done. It denotes the desire to effect a result. Ordinarily, if one performs a voluntary act with the desire to effect a result, he is said in law to intend that result. Furthermore, even though the defendant may have had no desire to effect the result -- that is, to contaminate and pollute the plaintiff's lands and waters, if the defendant does the act under circumstances known to it which make it substantially certain that the result will follow, the law charges the defendant with intent to accomplish that result.

Therefore, if you find that the defendant did not act with intent, as just described, to cause the oil and oil products to pollute and contaminate plaintiff's lands and waters, and you further find either that the defendant

did not know that spilled oil and oil products would necessarily pollute and contaninate the plaintiff's lands and waters, or that even though the defendant might have known, it was not substantially certain that spilled oil and oil products would contaminate and pollute plaintiff's lands and waters, then your verdict with respect to the cause of action for trespass will be for the defendant.

Third: If, on the other hand, you find that the defendant's acts were intentional, or that the defendant did actually know when he spilled oil and oil products or permitted such spillage that it would be substantially certain that the oil and oil products would contaminate and pollute plaintiff's lands and waters, then your verdict will be for the plaintiff on its cause of action against the defendant Cities Service for trespass, and you will then consider the issue of damages.

With Respect to Cause of Action for Negligence

9. Plaintiff asserts a claim against defendant Cities Service Oil Co. in a cause of action for common law negligence.

10. What is negligence? Negligence is lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act which a reasonably prudent person would have done under the same circumstances (New York Pattern Jury Instructions -- Civil, Volume I (PJI 2:10).

11. A defendant is not responsible for the consequences of its negligent conduct unless the risk of danger to the plaintiff was reasonably foreseeable. The exact occurrence or precise damages need not have been foreseeable; but damages to property as result of negligent conduct must have been merely not possible, but probable.

12. The defendant Cities Service, though a corporation, was bound at all times to act in a reasonably prudent manner. If, in acting in a reasonably prudent manner the defendant Cities Service could not foresee any danger to the

plaintiff as the result of Cities Service's conduct, or, if Cities Service's conduct was reasonable in the light of which it could foresee, there is no negligence.

13. However, there is negligence if defendant Cities Service Oil Co. could or should have foreseen damages to the plaintiff as a result of defendant's conduct, and if the defendant's conduct was unreasonable in the light of what was foreseeable to a reasonably prudent person.

14. With respect to the facts in this case, if you find that after April, 1972, the defendant Cities Service negligently caused or permitted spillage of oil or oil products on its property, and that it was reasonably foreseeable to a reasonably prudent person that such spillage would result in contamination of the plaintiff's lands and waters, and if you further find that such was the case -- that defendant Cities Service negligently suffered or permitted oil spillage on its own property and that such spillage did, in fact, cause contamination or pollution of the plaintiff's property, then you will find that Cities Service is guilty of actionable negligence.

15. If, on the other hand, you find that there was no oil spillage on Cities Service's property after April, 1972, or that even if there was such spillage, defendant

Cities Service could not have reasonably foreseen that such spillage would result in contamination and pollution of the plaintiff's property, then your verdict upon the cause of action alleging negligence against Cities Service must be in favor of the defendant.

16. In determining the issues of negligence or freedom from negligence and foreseeability as just described to you, you will consider all of the evidence in the case and give weight to such evidence, by way of testimony or documents as you determine credible and believable.

Note: Although contributory negligence is normally a factor in a cause of action predicated upon negligence, there is no contributory negligence in the factual contents of this case and it is the plaintiff's contention that it need not be a subject of the charge (Hogle v. H. H. Franklin Mfg. Co., 199 NY 388).

With Respect to Owner's Liability for Acts of His Agent, Tenant or Employee

Note: This charge applies to the causes of action predicated upon nuisance, trespass and negligence.

17. The evidence in this case indicates that the third party defendant, Monticello Gas & Oil Co. and its employees, physically operated the bulk oil plant across the highway from plaintiff's property. However, in this action, the plaintiff, if it may recover at all, may recover only against defendant Cities Service Oil Company.

18. Consequently, plaintiff may recover against defendant Cities Service for nuisance, trespass, or negligence, as the case may be, only upon the following conditions:

(i) if you find that the defendant Cities Service furnished the place from which, and the means with which habitual pollution and contamination, if any, of the plaintiff's property resulted, and

(ii) if you find that the defendant Cities Service knew of such practice even though committed by third party defendant Monticello Gas & Oil Co. and its employees, and

(iii) if you find that defendant Cities Service knew that such practice had existed for a long period of time, and

(iv) if you find further that the defendant

Cities Service, during the continuation of the contamination and pollution of the plaintiff's property, did nothing to prevent the same, then and only then, may the plaintiff recover from defendant Cities Service (Hogle v. H. H. Franklin Mfg. Co., supra, at 396).

With Respect to the Law of Compensatory Damages

19. "My charge to you on the law of damages must not be taken as an intimation that you should find for the plaintiff. It is for you to decide on the evidence presented and the rules of law I have given you whether plaintiff is entitled to recover from the defendant. If you decide he is not so entitled, you need go no further. Only if you decide that plaintiff is so entitled will you consider the measure of damages.

20. If you find that plaintiff is entitled to recover from the defendant, you must render a verdict in a sum of money which will justly and fairly compensate the plaintiff for all loss resulting from the (damage it) sustained." (New York Pattern Jury Instructions -- Civil, Volume I (PJI 2:277)

21. In the event that you find that the plaintiff is entitled to recover against the defendant Cities Service on any one or more of its causes of action for trespass, nuisance or negligence as I have just charged, then you will consider the issue of damages and you will then render a verdict in a sum of money which will justify and fairly compensate the plaintiff for all losses resulting from the damages it sustained.

22. A person whose property is damaged by the negligence or wrongful act of another is entitled to

compensation from such other person for the damages sustained in such a sum as will restore him as nearly as possible to his former position.

23. The defendant may recover the cost of repairs or of restoration where the damage is such that the property can be repaired or restored provided that the cost of repair or restoration does not exceed the property's market value.

24. The plaintiff may be awarded money damages for the loss of the use of its property during the time it is being repaired or restored.

25. The jury, in fixing damages, may award the plaintiff the difference between the value of the land before and after the harm. The plaintiff may also be compensated for discomfort and annoyance occasioned him by the defendant's acts (restatement Torts §929(c)).

26. With respect to restoration or repair of the plaintiff's premises, I charge you that the owner of property damaged by a nuisance has no duty to take measures to prevent further damage in order to minimize the damages (Am. Jur., Nuisances, 1st Edition, 138).

27. It is the claim of the defendant Cities Service that the spillage of its offending oil storage depot has been discontinued and that the nuisance has thereby been abated. The abatement of a nuisance does not affect the right to

recover damages for its past existence (Miller v. Edison Electric, 184 NY 17).

28. The measure of relief that the plaintiff may be entitled to is predicated upon the situation at the time this case is decided and is not limited by the time of the commencement of the suit (Gasse v. Development and F. Co. (Sup.), 135 NY Supp. 732; Damages, 42 NY Jur., §58).

29. The plaintiff is not to be denied damages because you may find that its property has not decreased in value if you find that the value of plaintiff's property would have increased in absence of the nuisance (Ackerman v. True, 175 NY 353).

Consequential Damages

30. The jury also has a right to consider, and to include in its award, that which the law refers to as consequential damages (Schmidt v. Merchants Dispatch, 270 NY 287). In considering consequential damages, you are to consider that some of the defendant's acts may have set in motion forces which affected the property of the plaintiff only after a long interval of time, and, then, only through new fortuitous conditions. Consequential damages are those which flow later from an injury too slight to be noticed at the time it is afflicted. So far as such consequential

damages may be reasonably anticipated, they may be included in a recovery for the injury though even at the time of trial they may not yet exist.

31. In other words, when substantial damage may result from any wrong affecting the property of another, a cause of action for such wrong accrues, and the plaintiff may recover for all damages suffered, not only for the damages to the time of trial, but also for such further future damages as it may prove by a fair preponderance of the evidence.

32. Examples of consequential damages which may be considered by the jury are: future loss of profits, if any; future annoyance and inconvenience, if any; future reasonable costs of temporary abatement, if any; and any other future losses or damages which you find that the plaintiff has proven by a fair preponderance of the credible evidence.

With Respect to Punitive Damages

33. In the event that you find that the plaintiff is entitled to compensatory damages, you may then consider the issue of punitive damages (Gill v. Montgomery Ward, 284 App. Div. 36 (3rd Dept., 1954)).

34. In other words, in addition to compensatory damages, you may, but are not required to, allow plaintiff punitive damages.

35. I have previously charged that you may award compensatory damages against defendant Cities Service for trespass, nuisance or negligence since the owner of real property may, upon the conditions charged, be liable for the unreasonable use of his property to an adjoining landowner damaged thereby.

36. I charge you, however, that with respect to punitive damages, the law upon which I am about to give to you, defendant Cities Service is not liable therefor merely because it owned the offending oil or bulk oil plant, or merely because you may have found that Cities Service is liable to the plaintiff for compensatory damages.

37. You may award punitive damages against Cities Service only if you find that it either committed itself those acts which I will now charge you are predicates for

punitive damage, or that such acts were committed by Monticello Gas & Oil Co., and that Monticello Gas & Oil Co. was an agent for defendant Cities Service, or that the acts of Monticello Gas & Oil were known and permitted by defendant Cities Service at the time that they were committed, or that the acts of Monticello Gas & Oil Co. were ratified or approved or participated in by defendant Cities Service (Lakeshore Ry. v. Prentiss, 147 US 101, 13 S. Ct. 261).

38. With respect to the question as to whether Monticello Gas & Oil Co. was an agent of defendant Cities Service, you will recall that defendant Cities Service owned the oil bulk plant across the highway from the plaintiff's property and that one Monticello Gas & Oil Co., Inc., since 1957, has been both a tenant and commission agent of the defendant Cities Service.

39. I am now about to charge you with respect to the specific law of punitive damages. I shall refer in this portion of the charge to the phrase "acts of the defendant." You are to consider this phrase in the light of the relationship which you find might have existed between defendants Cities Service and Monticello Gas & Oil and the responsibility of Cities Service for the acts of Monticello Gas & Oil as I have just charged.

40. Punitive damages may be awarded if you find that the acts of the defendant in causing the damages to plaintiff's property were wanton and reckless. Punitive damages are allowed to punish the defendant for its wanton and reckless acts and thus to deter others from the commission of like offenses. In other words, punitive damages may be awarded to deter this defendant from a repetition of the wrongful act (Hamilton v. Third Avenue R. Co., 53 NY 25) and to serve as a warning to others (Reynolds v. Pegler, 123 F. Supp. 36, aff'd 223 F. 2d 429, cert. den. 350 US 846).

41. What is a wanton and reckless act? An act is wanton and reckless when it is done in such a manner and under such circumstances as to show heedlessness and an utter disregard of the result upon the rights of others that

may flow from the doing of the act or the manner in which it is done (United Transportation v. Hass, 91 Misc. 311, aff'd 171 App. Div. 971, aff'd 222 NY 623).

42. In determining whether the defendant's acts were wanton and reckless so as to justify an award for punitive damages you may consider whether or not the defendant committed or participated in an illegal act or whether the defendant's conduct was a perverse and obstinate failure to discharge a legal duty. Such conduct on the part of the defendant, if found by you to have been the case, warrants the presumption of a reckless indifference of the rights of others which is equivalent to intentional misconduct (Costich v. The City of Rochester, 68 App. Div. 623).

43. In determining whether or not the plaintiff is entitled to recover punitive damages, you may consider whether or not the defendant intentionally violated its stipulation made in the Supreme Court of the State of New York in April of 1972. You may consider whether or not the defendant violated orders and directions of the New York State Department of Environmental Conservation (Gorham v. New Haven, 79 Conn. 670; Southland Co. v. Aaron, 224 Miss. 720, 80 So 2d 873; Klaman v. Central Kansas Co., Inc., 160 Kan. 697, 165 P2d 601; and Pettengil v. Tuco, 159 Me. 350,

193 A2d 367).

44. You may consider whether or not the defendant violated the provisions of the Environmental Conservation Law of the State of New York, the violation of which may be a crime (Environmental Conservation Law, Article 17, Sections 17-0501, 71-1933). You may consider whether or not the defendant violated provisions of the Public Health Law. And you are to consider, if you find such violations did occur, whether such violations on the part of the defendant were intentional.

45. You may also consider whether or not the defendant is guilty of misconduct so flagrant as to transcend mere carelessness, in which event you may find it deserves punishment more severe than would result from an award of compensatory damages only (Powers v. Manhattan Trans. Co., 120 NY 178).

46. If you find that the defendant has committed an act or acts of the nature just described, and if you find that such act or acts warrant an allowance of punitive damages, you may award, as punitive damages, that amount that seems just to you by way of punishment to the defendant and as a warning to others against committing like offenses (Cosrkowski v. Roman Catholic Church, 262 NY 320).

47. In fixing punitive damages, you may consider the defendant's financial condition, since damages which would be exemplary when inflicted upon a person in moderate circumstances would be trivial, and in no practical sense exemplary when imposed upon a person whose property and income was very much larger (Am. Jur., Evidence, 1st Edition, §259; 21 St. Johns L. Rev. 198; Klauber v. SKE Operating Co., 163 Misc. 418).

Respectfully submitted,

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DEFENDANT'S REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

DORALEE ESTATES, INC.,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and
Third-Party Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS &
OIL CO., INC.,

Third-Party Defendants.
- -X

73 Civ. 907 (RO)

DEFENDANT, CITIES SERVICE OIL COMPANY'S REQUESTS TO CHARGE

1.

A plaintiff seeking to recover damages for private nuisance must show, first, that conduct of the defendant caused an interference with plaintiff's right to use and enjoy his land, second, that the interference was substantial, third, that defendant's conduct was intentional, and fourth, that defendant's conduct was unreasonable under all of the circumstances. Plaintiff in this case claims that defendant has unreasonably interfered with plaintiff's use of her land by causing or permitting oil to flow or seep from the oil terminal, through an intervening ditch and culvert and swamp, into

two small ponds on plaintiff's lands. Defendant denies that its conduct caused any interference, denies that there has been any substantial interference and says that its use of its own property has at all times been reasonable. The burden of proving all of the elements of private nuisance that I have outlined for you is on plaintiff.

Unless you find that there was an interference with plaintiff's right to use and enjoy her land which was caused by defendant's conduct, your verdict must be for defendant. The oil terminal was leased by Cities Service to MGO Corp. and Monticello Gas & Oil Co., Inc. Cities Service was not in possession or control of the premises and did not commit any act or omission thereat which would have caused the conditions alleged by plaintiff. I charge, therefore, that Cities Service can have no liability to plaintiff for damage to plaintiff's premises and I direct you to return a verdict in favor of Cities Service.

2 N.Y.P.J.I. 3:16

Because plaintiff has heretofore released Cities Service from liability for any acts or conditions through October 24, 1972, plaintiff may recover damages only for conditions caused, or in existence, after that date. Such damages can only be nominal in view of the discontinuance of oil terminal operations in early 1973 and the action of Cities Service in removing the earth on the surface of the oil terminal and replacing it with clean material.

In evaluating the claim asserted by plaintiff you may give consideration to claims on the part of plaintiff that sewage, rather than oil seepage, damaged its property.

In considering whether plaintiff sustained any damage, you may consider the fact that plaintiff collected progressively higher rents and greater total rents, during the period of the condition about which it complains, and expanded its facilities substantially during that period.

Punitive damages are recoverable only for willful, malicious or reckless injury. I charge you that there is no proof of such action on the part of Cities Service and direct you not to find or return a verdict for punitive damages against that defendant.

14 N.Y. Jur. 38 (§179)
2 Devitt & Blackmar 202 (§7811)

Unless the plaintiff has shown by a preponderance of the evidence that Cities Service caused or is responsible for creating a condition resulting in actual proven damage to plaintiff, you should find in favor of Cities Service.

Cities Service was not a party to any proceedings before the New York State Department of Environmental Conservation and is not bound by any findings or directives of that department and you are not to consider any such proof in your evaluation of liability.

Plaintiff is entitled to recover damages only to the extent that it may have suffered a reduction in rental income by reason of conditions proven to be attributable to Cities Service. In the absence of proof of such impairment of rental income, plaintiff may not recover damages. In this connection, you may properly give consideration to proof showing that plaintiff's rental income increased during the period in question.

2 N.Y.P.J.I. 666 (comment),
Woolsey v. N.Y.E.R.R. Co. 134 N.Y. 323, 30 N.E. 387,
Pritchard v. Edison Elec. Illum. Co., 179 N.Y. 364, 72 N.E. 243.

AS TO THIRD-PARTY CLAIM

By reason of the provisions of the lease between Cities Service Oil Company, as landlord, and MGO Corp. and Monticello Gas & Oil Co., Inc., as tenant, the latter two corporations are liable to Cities Service for any liability which may be found on the part of Cities Service to the plaintiff and, in addition, MGO Corp. and Monticello Gas & Oil Co., Inc. are liable to Cities Service for the reasonable cost and expense to Cities Service of defending against the plaintiff's claims and I direct you to bring in a verdict in favor of Cities Service Oil Company and against MGO Corp. and Monticello Gas & Oil Co., Inc. in the amount of any liability found by you on the part of Cities Service to the plaintiff, together with the reasonable cost and expense to Cities Service of defending against plaintiff's claims.

Lease, ¶5 (Compliance with requirements of government authorities), ¶6 (Tenant to make all repairs and maintain premises in good condition), and ¶8 (Agreement to defend, indemnify and save harmless).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

v.

CITIES SERVICE OIL CO., a Delaware Corporation,

Defendant and Third-Party Plaintiff,

v.

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendant.

----------x

73 Civ. 907

New York, New York
January 3, 1977 - 10:25 A.M.

B e f o r e:

HON. RICHARD OWEN, District Judge.

APPEARANCES:

GERALD ORSECK, ESQ.
Attorney for Plaintiff

BAER & MARKS, ESQS.
Attorneys for Defendant Cities Service
By: GEORGE H. COLIN, ESQ., of Counsel

GRUBBS & SUTERA, ESQS.
Attorneys for Third Party Defendant
By: ROBERT M. GRUBBS, ESQ., of Counsel

Also Present: Jeffrey L. Liddle

(In the robing room.)

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: I am allowing the defendant and the third-party defendant each an extra challenge to be exercised separately if they so desire. Mr. Colin excepts to that.

MR. COLIN: As I understand what you are allowing, sir, you are allowing the defendant and third-party defendant three challenges between the two of them?

THE COURT: Section 1870 allows each side three peremptory challenges. I am in discretion, because it says, "may allow addition" -- I am allowing one each to each defendant.

MR. COLIN: Does that mean, your Honor, that Cities Service will have the three allowed challenges plus the additional one?

THE COURT: That means that the first round will be one for the plaintiff and one collectively for Cities Service and the third-party defendant, and one individually for Cities Service.

The second round will be plaintiff, and then one individually for the third-party defendant and one collectively for both.

The third round you will have one and the defendants will have one collectively.

MR. COLIN: May I note my exception to your Honor's ruling.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Mr. Colin, I will give your 3, 4, 12, and 13 in some form. The balance of them have to do with evidence that we will be hearing, and I will charge the jury appropriately at the close of the case.

Mr. Grubbs, I am going to similarly give your 1, 2, and 3. I will ask them in substance. They are all appropriate, in my opinion, for the jury selection. I will be touching upon those.

Gentlemen, thank you very much.

MR. ORSECK: I have one question, your Honor. Do you have any policy about quitting time in the afternoon?

THE COURT: Roughly, four-thirty.

MR. ORSECK: I wanted to figure out whether to stay over or not.

THE COURT: If there is a witness on that we can get rid of if we go a few extra minutes, I will go close to five, but I generally quit at four-thirty plus.

MR. ORSECK: Today, it is conceivable, your

Honor -- I'm not talking about early in the afternoon -- I might run out of proof. My witnesses have to come down.

I will finish the plaintiff's case tomorrow.

Your Honor, my requests are in greater detail They are not ordinary requests.

MR. COLIN: I have a trial memorandum for you, your Honor.

THE COURT: If you will give me your charges, I will give them to my law clerk.

MR. GRUBBS: We have submitted them, your Honor.

MR. ORSECK: We filed them back in July, your Honor.

MR. COLIN: Here are mine, your Honor.

(In open court.)

MR. ORSECK: The plaintiff is ready, your Honor.

MR. COLIN: The defendant Cities Service is ready, your Honor.

MR. GRUBBS: The third-party defendants are ready, your Honor.

(The panel was sworn.)

THE CLERK: Juror No. 1 is Madelaine Burke.

Juror No. 2 is Linda M. Ansalone.

Juror No. 3 is Ernest Gershenfeld.

Juror No. 4 is John Rowe.

Juror No. 5 is Kenneth Thornhill.

Juror No. 6 is Edgar Melendez.

THE COURT: Good morning, ladies and gentlemen. I am going to keep my voice up sufficiently so those of you in the back can hear me because it may come to pass that one or more of you in the back may come to occupy a seat up front. I want you to pay attention because things I may ask may be matters that you should call to my attention should you be called upon to fill such a seat.

We are hear to try a civil case, and, as I say to all panels of prospective jurors that come before me, I gather this is the first week of service for each and every one of you; am I right?

Those of you who are here are about to enter into what I regard as one of the highest duties of citizenship in this country, which is that you will sit in judgment, you jurors, you six jurors who are finally chosen, to decide issues of fact between your fellow citizens. It is the juror's duty to decide the fact issues, to decide what happened.

I am sure that many of you are doing this at considerable sacrifice in terms of time and, perhaps, money.

You may, over the weeks, find yourselves waiting in boring and uncomfortable circumstances, but the service is invaluable; it is done in courtrooms such as this and your presence is deeply appreciated.

Now, as I indicated to you a second ago, we are here to try a civil case, and there are three parties to this case.

The plaintiff is a party called Doralee Estates, Inc.

The defendant is a corporation called Cities Service Oil Company.

The third-party defendant -- and I will explain a little of this so you have some feel, but I am sure the lawyers will do a better job with that because it is their case that they are bringing to you and they know it up to here -- the third-party defendant in this case is the MGO Corp. and the Monticello Gas and Oil Company Inc.

The issue, as I indicated, the lawyers will develop fully for you, but just so you have some feel of the kind of case you are in, which is necessary to have an appropriate jury selection, this case has to do with, essentially, a problem created when some oil seeped through the ground of an oil storage plant up in Monticello, New York, underground over towards a lake, and the plaintiff

1 pgem

2 claims that it is the owner of two lake-front bungalow

3 communities, and that this oil came from the oil storage

4 plant, went underground, and caused damage at the lake

5 waterfront. This is the nature of the case that we are

6 essentially here to try.

7 The plaintiff claims that this damage was

8 caused by the Cities Service Oil Company and we are, in

9 effect, going to try two lawsuits here because the Cities

10 Service Oil Company in turn denies its liability, denies

11 its responsibility, but contends if such responsibility is

12 found by a juror, then there are legal reasons, there are

13 factual and legal reasons, why MGO Corporation and the

14 Monticello Gas & Oil Company are responsible to it for

15 this and not them directly. So we will try two lawsuits:

16 the first by a plaintiff for what the claim is, a wrongdoer,

17 and the second by the wrongdoer who claims it is not a

18 wrongdoer but, if it is, there is a third party that is

19 responsible for it.

20 The trial, counsel tell me, should last no

21 more than three or four days.

22 Having given you in a very brief form what

23 the issues are, and having pointed out there is a plaintiff

24 and there is a defendant, and then the defendant brings in

25 a third-party defendant, I want to tell you that these

issues are brought to a head before you in pieces of paper called a complaint, an answer, a third-party complaint, and a third-party answer.

I want to make it crystal clear, just because a claim is typed on a piece of paper, that doesn't mean anything whatsoever; that is just a statement making it clear as to what the ground is that is going to be fought over, so the parties know what the issues are.

The plaintiff has raised a claim. The defendant has denied it. The defendant has raised a claim against the third-party defendant, and the third-party defendant has denied that.

Just because a person makes a claim doesn't mean that party is entitled to recovery. The claim must be proved, must be proved to your satisfaction, as I will charge you on the law, before there can be any recovery. Only the evidence is going to count in this case, and that is the evidence you will hear from the witness box and from the records that are admitted before you to properly consider.

Certain corporations here may be larger than other corporations. We are not going to decide this case on who is bigger or who is smaller, or for any other reason of that kind. It is to be decided on the merits of the evidence that you, the jury, will hear.

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At this point, what we are engaging in is what those of you who have done jury service before know is called a voir dire, and for those of you who have not done jury service, that's nothing more than a brief inquiry of you as a prospective juror to determine as far as possible in this human world six jurors who will come to this case fairly, impartially, without bias, without prior leanings, without backgrounds that cause them to tend to go one way or the other. We need to have six jurors who will hear completely and fairly the issues here to be tried as to all parties.

During the course of this, the attorneys will have a right to challenge the jurors, and it is not only a right but it is a duty to a client, if the attorney feels so motivated. No inference is to be drawn against any attorney because of the exercise in the light of a challenging of a juror.

I have read this to you but I will read it to you again: The plaintiff here is Doralee Estates, Inc., which I gather is a New York corporation, which is the owner of two bungalow communities on a lake in Monticello, New York.

Am I right?

MR. ORSECK: Almost. One community on two lakes.

THE COURT: Have any of you six here ever heard of Doralee Estates, Inc. in any way? Have you been up there?

The defendant and also the third-party plaintiff, as you are coming to understand that word, is Cities Service Oil Company, which is a subsidiary of --

MR. COLIN: Of Cities Service Company.

THE COURT: Have any of you ever heard of either of those companies? Cities Service Oil or Cities Service Company?

They retail gas to what? CITCO?

MR. COLIN: That's the brand. That's a wholesale supplier, independent dealers.

THE COURT: In any event, do any of you have CITCO as a favorite brand of gas that you buy all the time which would cause you to favor it, somebody who is connected with CITCO, if you were selected here as a juror?

Similarly, is there anything about the fact that Cities Service Oil Company is a party here? Does that make you lean against them? Knowing you know about this case, does that make you lean one way or the other?

The MGO Company -- are those the initials for Monticello Gas & Oil?

MR. GRUBBS: Yes, your Honor.

THE COURT: They, which spelled out Monticello Gas & Oil Company, are the third-party defendants. Has anybody ever heard of those companies?

The plaintiff Doralee is represented in this courtroom by Mr. Gerald Orseck. Mr. Orseck is from Liberty, New York, which is up above Rockland County a little bit. Mr. Orseck, stand, please.

(Pause.)

THE COURT: Have you ever had occasion to use Mr. Orseck's legal services?

Cities Service is represented by the firm of Baer & Marks of 70 Pine Street. In this courtroom Baer & Marks is present through Mr. George Colin who is now rising. He will be the counsel for Cities Service. Do any of you know that firm? Do any of you know Mr. Colin?

MGO Corp. and Monticello Gas & Oil is represented by the firm of Grubbs & Sutera, 27 Cedar Street; Mr. Robert Grubbs is standing at this point. He is going to represent the firm. He is standing now.

May I ask if any of you ever have been employed by or had a close friend or a relative who has been employed by or engaged in any governmental or non-governmental agency which is engaged in environmental or pollution control?

PROSPECTIVE JUROR NO. 4: My mother has worked

for the Scenic Hudson Preservation Conference, which is an environmental group.

THE COURT: Do you feel that that association of your mother might in some way affect your ability to determine the issues here fairly and impartially were you to be selected?

PROSPECTIVE JUROR NO. 4: No.

THE COURT: It is your conscience that we are searching. If you think that might make you lean one way or the other, then, obviously, it would be fairer for you not to sit. On the other hand, if you truly believe that it would not affect you, it is not a disqualifying matter for cause.

I take it you feel that this would not cause you to lean one way or the other before ou heard a word of proof here?

PROSPECTIVE JUROR NO. 4: Right.

THE COURT: Are there any of you six who hold strong beliefs about environment or conservation which might cause you to be prejudiced, one way or the other, in this case in which the damage is claimed to have happened from seeping oil?

Do any of you have any hostility towards oil companies or large oil companies of any kind?

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Have any of you ever owned or managed or operated any real estate or served as a real estate broker in a case?

Have any of you ever relatives who are involved in the distribution of oil or oil products, petroleum or petroleum products?

Mrs. Burke, you are from The Bronx?

P.J. NO. 1: Yes, sir.

THE COURT: How long have you lived there?

P.J. NO. 1: About twenty-five years.

THE COURT: Are you employed?

P.J. NO. 1: No, sir.

THE COURT: Were you ever employed?

P.J. NO. 1: No, sir.

THE COURT: Are you married?

P.J. NO. 1: Yes, sir.

THE COURT: What does your husband do?

P.J. NO. 1: He is a teacher.

T HE COURT: In the New York City school system?

P.J. NO. 1: He is with the parochial school system.

THE COURT: What subject does he teach?

P.J. NO. 1: History.

1 THE COURT: How long has he been teaching?

2 P.J. NO. 1: I think about twelve or thirteen

3 years.

4 THE COURT: What did he do before that?

5 P.J. NO. 1: He was with the Police Department

6 in New York City.

7 THE COURT: Do you have any children?

8 P.J. NO. 1: Seven.

9 THE COURT: Do any of them work?

10 P.J. NO. 1: I have three married and two

11 going to school, and two are younger.

12 THE COURT: Do any of them work for oil com-

13 panies?

14 P.J. NO. 1: No.

15 THE COURT: Or bungalow communities?

16 P.J. NO. 1: No.

17 THE COURT: Have you ever been involved in

18 a situation in which you have been sued or brought a law-

19 suit?

20 P.J. NO. 1: I brought a lawsuit, but I was

21 not the one who was sued.

22 THE COURT: Was this involving an accident of

23 some kind?

24 P.J. NO. 1: Yes.

25

THE COURT: Involving automobiles?

P.J. NO. 1: Yes.

THE COURT: Do you have any feelings one way or the other about the system of justice that brings you to court leaning one way or the other?

P.J. NO. 1: No, sir.

THE COURT: Have you ever served upon a jury?

P.J. NO. 1: No, sir.

THE COURT: Can you think of any reason that you could not sit here and listen fairly and impartially to the subject matter that is to be litigated with respect to the parties in this lawsuit?

P.J. NO. 1: I can't think of anything, your Honor.

THE COURT: Gentlemen, do you have any questions of Juror No. 1?

MR. COLIN: I have none.

MR. ORSECK: May we come to the side bar, your Honor?

THE COURT: Yes.

(At the side bar.)

MR. ORSECK: One of the defendants is represented by an insurance company. When you made requests for extraordinary requsts I assumed that standard one would be asked,

so I wonder if you might ask whether or not, of the whole panel, any of them have any stock in an insurance company or work for an insurance company.

THE COURT: I normally do that in automobile cases, but I don't see any reason to do it in this kind of case.

MR. GRUBBS: I would even add in support of that statement, that quite the contrary, we are representing our client on --

THE COURT: I don't see that that's appropriate here. Why is it?

MR. ORSECK: There is a cause of action --

THE COURT: When you have an automobile collision the jury is now sophisticated enough to know that that's the case, but this is a commercial case.

MR. ORSECK: There is one cause of action in negligence. I believe the New York CPL law as to the selection of the jury is almost a state matter administered by the federal court in a diversity case. My understanding is that in a negligence action where there is coverage or claim of coverage or color of coverage it is a question that should be asked as a matter of right and not even discretion. In other words, the form of the question is provided right in the CPLR.

Your Honor knows that I had a ski case with one of the hotels. The plaintiff has always requested and the Court --

MR. COLIN: That's personal injury stuff. This is essentially a trespass and nuisance.

THE COURT: If you would like me to, I will recess and look up the law as you provide it to me, but this seems to me to be a strange case in which to bring that issue in. That can only be suggesting to the jury there is insurance here to cover these, what I recall as commercial-type claims. This is not a personal injury accident-type situation where you are trying to smoke out a juror who is connected with an insurance company and, therefore, you want to have the option of taking them all. If you like, I will recess at this point to get my books down and I will --

MR. ORSECK: I would rather withdraw the request.

(In open court.)

THE COURT: Miss Ansalone, you are from The Bronx?

P.J. NO. 2: Yes.

THE COURT: How long have you lived there?

P.J. NO. 2: Twelve years.

THE COURT: Are you employed?

P.J. NO. 2: Yes.

THE COURT: What do you do?

P.J. NO. 2: I work as a receptionist for a printing firm in New York.

THE COURT: And the name of the firm?

P.J. NO. 2: Lawford Press Inc.

THE COURT: How long have you been there?

P.J. NO. 2: A year and three months.

THE COURT: Where did you work before that?

P.J. NO. 2: I was a student.

THE COURT: Where was that?

P.J. NO. 2: State Teachers College in Maryland.

THE COURT: Are you married?

P.J. NO. 2: No.

THE COURT: Have you ever been in a lawsuit of any kind?

P.J. NO. 2: Yes. I brought suit against someone for an automobile accident six years ago.

THE COURT: Did that experience in any way color your feelings about the court system or the system of justice?

P.J. NO. 2: No, sir, none whatsoever.

THE COURT: Have you ever served upon a jury before?

P.J. NO. 2: First time.

THE COURT: Are there any questions of Miss Ansalone?

Mr. Gershenfeld, you are from Manhattan. Whereabouts are you?

P.J. NO. 3: 18th Street.

THE COURT: How long have you lived there?

P.J. NO. 3: Twenty-eight years.

THE COURT: Are you employed, sir?

P.J. NO. 3: No.

THE COURT: Are you retired?

P.J. NO. 3: Right.

THE COURT: What did you do before you retired?

P.J. NO. 3: Salesman.

THE COURT: For what kind of firm?

P.J. NO. 3: Mutual funds.

THE COURT: How long did you sell for a mutual fund?

P.J. NO. 3: Sixteen years.

THE COURT: What did you do before that?

P.J. NO. 3: I had a business of my own.

THE COURT: What kind of business?

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P.J. NO. 3: Selling hardware to retail stores.

THE COURT: Are you married?

P.J. NO. 3: Yes.

THE COURT: Did your wife ever work?

P.J. NO. 3: Yes.

THE COURT: What did she do?

P.J. NO. 3: Manager at R. Macy's.

THE COURT: Do you have any children that are working?

P.J. NO. 3: No.

THE COURT: Have you ever been in a lawsuit, you or anybody in your immediate family?

P.J. NO. 3: No.

THE COURT: Have you ever served upon a jury before?

P.J. NO. 3: Yes.

THE COURT: What kind of cases: civil or criminal?

P.J. NO. 3: No. In the court next door. Small cases.

THE COURT: Did you ever sit on any criminal cases?

P.J. NO. 3: No.

THE COURT: How recently was the last time

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you sat in a case as a juror?

P.J. NO. 3: About a year and a half ago.

THE COURT: Did you ever have one that involved a commercial action of this kind?

P.J. NO. 3: Not that I can remember.

THE COURT: What I am trying to develop here is the fact that each lawsuit stands on its own two feet and must be judged on its own merits. I would not want some spillover from an earlier case, some instructions that the judge may have given you in an earlier case, to stick in your mind because this case is to be decided on the evidence in this room and on the law that I would charge you at the end of the case applicable to the facts we will hear. Would you have any problem in putting from your mind any prior experience in the courtroom and deciding this case only on the evidence here and the law as I will charge you?

P.J. NO. 3: I don't think the other cases I was on last time has anything to do with this.

THE COURT: You could put them out of your mind?

P.J. NO. 3: I don't see any relationship at all.

THE COURT: Gentlemen, are there any questions

of this juror?

(Pause.)

THE COURT: Mr. Rowe, you are from Scarsdale, New York?

P.J. NO. 4: Not any more. I am at 226 West 76th Street.

THE COURT: How long have you lived there?

P.J. NO. 4: One month.

THE COURT: How long did you live in Scarsdale?

P.J. NO. 4: About that.

THE COURT: Did you grow up in Westchester County?

P.J. NO. 4: That's right. I have not lived there for five years.

THE COURT: Are you employed?

P.J. NO. 4: No.

THE COURT: Have you been employed?

P.J. NO. 4: Yes.

THE COURT: What work have you done?

P.J. NO. 4: I have just worked as a demonstrator, demonstrating rug shampoos in a store. Before that I was a student.

THE COURT: Where were you a student?

P.J. NO. 4: In London studying.

THE COURT: Are you married?

P.J. NO. 4: Yes.

THE COURT: Does your wife work?

P.J. NO. 4: Yes.

THE COURT: What does she do?

P.J. NO. 4: She works as a secretary.

THE COURT: Have you ever been involved in a lawsuit with any member of your family?

P.J. NO. 4: No.

THE COURT: Have you ever served upon a jury?

P.J. NO. 4: No.

THE COURT: Are there any questions of this juror?

MR. COLIN: May I inquire briefly as to the occupation of the mother of Mr. Rowe. I believe Mr. Rowe said that his mother was employed --

THE COURT: She worked in the past as a volunteer for that organization, the Scenic Hudson Preservation Conference.

MR. COLIN: Are you also a member of that organization?

P.J. NO. 4: No.

MR. COLIN: Have you participated in those activities in the past?

P.J. NO. 4: No.

MR. COLIN: Do you share an interest --

P.J. NO. 4: I was a member in the past. I have been a member of the organization. I am not at present.

MR. COLIN: Have you been a member of any other environmental preservation organizations?

P.J. NO. 4: No.

#2 MR. COLIN: Do you believe strongly in the cause of environmental preservation?

THE COURT: I'll put it in a different way: Is there anything about your feelings about environmental preservation that you feel would render you unable to sit here fairly and impartially? I think I put this question to you once before.

P.J. NO. 4: No.

THE COURT: Mr. Thornhill, you are from The Bronx?

P.J. NO. 5: Yes.

THE COURT: How long have you lived there?

P.J. NO. 5: Nine years.

THE COURT: And before that?

P.J. NO. 5: I lived in The Bronx on Trinity Avenue.

THE COURT: Are you employed?

P.J. NO. 5: Yes.

THE COURT: What do you do?

P.J. NO. 5: I work for the Department of Water Resources, EPA, Environmental Protection Agency.

THE COURT: This is a City agency?

P.J. NO. 5: Yes.

THE COURT: How long have you worked for the City Agency?

P.J. NO. 5: I have been there since 1962.

THE COURT: What do you do for that agency?

P.J. NO. 5: Sewer maintenance work.

THE COURT: How long have you been doing that?

P.J. NO. 5: Since 1962.

THE COURT: Did you work before that?

P.J. NO. 5: Yes.

THE COURT: What did you do before that?

P.J. NO. 5: Before that I was in the Parks Department.

THE COURT: You have heard the questions here about the environment and its protection, and you work for an organization that has that as its aim. Does that, in any way, affect your thinking about the issues that you hear are to be litigated in this case?

P.J. NO. 5: I don't think so.

THE COURT: Do you ever get involved in any way in environmental protection?

P.J. NO. 5: No.

THE COURT: Are you married?

P.J. NO. 5: Yes.

THE COURT: Does your wife work?

P.J. NO. 5: Yes.

THE COURT: What does she do?

P.J. NO. 5: She is a nurse.

THE COURT: This is in a hospital or private?

P.J. NO. 5: Hospital.

THE COURT: Have you ever been in a lawsuit of any kind?

P.J. NO. 5: No.

THE COURT: Or any member of your family?

P.J. NO. 5: No.

THE COURT: Have you ever served on a jury before?

P.J. NO. 5: This is the first time.

THE CLERK: Can you think of any reason you cannot sit here fairly and impartially, given the little you know about this case?

P.J. NO. 5: I cannot think of any reason.

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THE COURT: Are there any questions of this man?

MR. ORSECK: No, your Honor.

THE COURT: Mr. Melendez, you are from West 35th Street, New York City?

P.J. NO. 6: Yes.

THE COURT: How long have you lived there?

P.J. NO. 6: Nineteen years.

THE COURT: Are you employed?

P.J. NO. 6: Yes.

THE COURT: What do you do?

P.J. NO. 6: Rental agent in the Bronx.

THE COURT: What kind of properties do you rent?

P.J. NO. 6: Apartments.

THE COURT: How long have you been doing that?

P.J. NO. 6: One year.

THE COURT: Were you employed before that?

P.J. NO. 6: I was a student.

THE COURT: Where?

P.J. NO. 6: Manhattan Community.

THE COURT: Are you married?

P.J. NO. 6: Yes.

THE COURT: Does your wife work?

P.J. NO. 6: Yes.

THE COURT: What does she do?

P.J. NO. 6: She is a director of a tenant orientation program also in the same company.

THE COURT: What is a tenant orientation?

P.J. NO. 6: She teaches people how to actually take care of the apartments and everything else involved.

THE COURT: Have you ever been in a lawsuit, or your family?

P.J. NO. 6: No, sir.

THE COURT: Have you ever served as a juror?

P.J. NO. 6: No.

THE COURT: Can you think of any reason you could not sit here fairly and impartially?

P.J. NO. 6: No.

THE COURT: Are there any questions of this juror?

(Pause.)

THE CLERK: Juror No. 1 is excused. Juror No. 1 is now Nora A. Christian.

THE COURT: Mrs. Christian, is there anything you heard me ask anybody before that triggers off an answer you ought to give me?

P.J. NO. 1: No.

THE COURT: You live in The Bronx?

P.J. NO. 1: I have moved in August and I am now residing at 3824 Bronx Boulevard in The Bronx also.

THE COURT: How long have you lived in The Bronx?

P.J. NO. 1: All my life. Most of my life.

THE COURT: Are you employed?

P.J. NO. 1: Yes.

THE COURT: What do you do?

P.J. NO. 1: I am a receptionist.

THE COURT: What kind of company?

P.J. NO. 1: Plumbing and heating and construction company.

THE COURT: How long have you done that?

P.J. NO. 1: The past seven years.

THE COURT: Did you work before that?

P.J. NO. 1: Yes.

THE COURT: What did you do?

P.J. NO. 1: I worked in the telephone company at one time and then I worked temporarily for different corporations, none of which were with an oil company.

THE COURT: Are you married?

P.J. NO. 1: I am divorced.

THE COURT: What did your husband do?

P.J. NO. 1: He was a New York City policeman.

THE COURT: Do you have children that are old enough to be working?

P.J. NO. 1: I have five children and my oldest boy is in college full time, and I have a daughter who is a nurse.

THE COURT: Have you ever been involved in a lawsuit?

P.J. NO. 1: I was on jury duty before but I have not -- only the divorce suit. That's all.

THE COURT: What kind of jury service did you do?

P.J. NO. 1: Here in court. It was a drug case.

THE COURT: This was a criminal case that went to a verdict?

P.J. NO. 1: Yes.

THE COURT: You may recall that one of my colleagues doubtless instructed you about proof beyond a reasonable doubt which was the standard for the Government to meet.

P.J. NO. 1: Yes, sir.

THE COURT: Here we are trying a civil case.

The standard is a much less rigorous standard, much less demanding standard. It is called, and I will expound on this later, a fair preponderance of the evidence.

How long ago was this service?

P.J. NO. 1: Two or three years ago.

THE COURT: Would you have any trouble in putting from your mind the standard you and eleven other jurors grappled with at that time and applying the law as I would give it to you here?

P.J. NO. 1: I don't think so, sir.

THE COURT: The plaintiff does not have to prove its case here by a reasonable doubt, beyond a reasonable doubt. I would not want you to have bells ringing from past service that would say they have not met the standard that some other judge charged you. You would have to put that out of your mind.

P.J. NO. 1: I understand that.

THE COURT: Are there any questions?

(Pause.)

MR. COLIN: May I approach the bench, your Honor?

THE COURT: Yes.

(At the side bar.)

MR. COLIN: I believe we have cause for removal

of Jurors 4 and 5.

Mr. Rowe has admitted he was formerly a member of an environmental preservation organization, and I think it is also significant that he did not disclose that membership on the first round of his interrogation by your Honor. I think that membership in an organization so dedicated should be cause for removal in a case such as this which does involve environmental pollution.

THE COURT: How about No. 5?

MR. COLIN: No. 5 is an employee of the Environmental Protection Administration of the City of New York, and I think for the same reasons that I advanced in the case of No. 4, the fact that he did not disclose this on the first round, and the fact that his work is related to sewer maintenance, whereas this case is strongly involved with ditches and devices for the removal of waters and wastes, again renders - the nature of his work and his failure to initially reveal it -- this should be cause for his removal.

THE COURT: I will deny that application without any question as to No. 5.

What about Juror No. 4?

MR. ORSECK: As to No. 4, I need not remind the Court that this is a diversity case. The jury should

not be selected much different than it is.

MR. COLIN: I wonder whether we could be heard by the jury.

THE COURT: I don't think so.

MR. ORSECK: It is a diversity case.

THE COURT: Go on to the merits.

MR. ORSECK: The merits are the CPL law which states what grounds for cause are. He is talking about his impressions which he can take care of very well by a peremptory challenge. This man said he was a member. You asked the general question: were any of you members? Then he volunteered toyour Honor on specific questions that he had been a member of this agency. If Mr. Colin doesn't like him, I would suggest he exercise a peremptory.

MR. COLIN: He voluntarily joined such an organization. He did this --

THE COURT: I know, but all of us are distressed over such things as spillage of oil in the Atlantic, and corporations dumping their waste in the Hudson. This is a vastly different question here. I don't see that that bears all that much connection, although I have given the questions that you have asked me to give him in that area.

I will deny that application.

(In open court.)

THE CLERK: Mr. Rowe, you are excused.

Mr. Thornhill, you are excused.

Juror No. 4 is now Robert H. Boyle.

Juror No. 5 is now Jean M. Williams.

THE COURT: Mr. Boyle, you are from Croton-on-Hudson?

P.J. NO. 4: Yes.

THE COURT: How long have you lived there?

P.J. NO. 4: Sixteen years.

THE COURT: Where did you live before that?

P.J. NO. 4: San Francisco, California.

THE COURT: Are you employed?

P.J. NO. 4: Yes, sir.

THE COURT: What do you do?

P.J. NO. 4: I am a writer for Sports Illustrated Magazine.

THE COURT: How long have you done that?

P.J. NO. 4: Twenty-two years.

THE COURT: I take it when you say you are a writer for them, you write articles on sports events of one kind or another, or sports personalities?

P.J. NO. 4: Everything including environmental articles.

THE COURT: How does that leave you feeling

about this case and the fairness and impartiality that you bring to it?

P.J. NO. 4: I think I can be fair and impartial, but I have a long record of having been involved not only as a journalist but as a private citizen in environmental matters, and I have participated in court cases on pollution.

THE COURT: As a witness?

P.J. NO. 4: As a witness; as one who reported the violator.

I also happen to be a vice president of the Scenic Hudson Preservation Conference.

THE COURT: Mr. Boyle, I think I am going to excuse you.

(Prospective Juror No. 4 was excused.)

THE CLERK: Juror No. 4 is now Frieda Kearns.

THE COURT: You are from The Bronx?

P.J. NO. 4: Yes.

THE COURT: How long have you lived there?

P.J. NO. 4: Seven years.

THE COURT: And before that?

P.J. NO. 4: Bronx Boulevard in The Bronx.

THE COURT: You have lived in The Bronx for some time?

P.J. NO. 4: Yes.

THE COURT: Are you employed?

P.J. NO. 4: Yes, sir.

THE COURT: What do you do?

P.J. NO. 4: Elevator Division in Brooklyn; elevators in Brooklyn.

THE COURT: What do you do for them?

P.J. NO. 4: I bill and I route the inspectors. I worded it wrong: I route the inspectors and I bill the landlords for the inspections.

THE COURT: How long have you been doing that?

P.J. NO. 4: I am there a year.

THE COURT: And before that?

P.J. NO. 4: I was in Housing.

THE COURT: This is with the City?

P.J. NO. 4: Yes.

THE COURT: How long were you with the City and Housing?

P.J. NO. 4: Six years in Housing and one year in Buildings before I went to Brooklyn.

THE COURT: Are you married?

P.J. NO. 4: Yes.

THE COURT: What does your husband do?

P.J. NO. 4: He works for the Ford Motor Company.

THE COURT: How long has he been working for them?

P.J. NO. 4: Twenty years.

THE COURT: What does he do for Ford Motors?

P.J. NO. 4: Inspector.

THE COURT: Where is the plant that he works for?

P.J. NO. 4: New Jersey.

THE COURT: Have you any children that are working?

P.J. NO. 4: Yes.

THE COURT: Tell me about them.

P.J. NO. 4: One son is in Spring Valley; he is working as a sneaker salesman. The other one works for Con Edison.

THE COURT: Have you ever been involved in a lawsuit, any member of your family?

P.J. NO. 4: My husband is.

THE COURT: Tell me about that?

P.J. NO. 4: In the co-op. I live in Co-op City.

He was walking down the street and a mortar-pot, they were building these schools there; there was a strong wind and the wind blew this water pot and knocked

him down, and he fell. It was a rusty pot that they had discarded, so he is suing.

THE COURT: That lawsuit is pending?

P.J. NO. 4: Yes.

THE COURT: Is there anything about that lawsuit that gives you feelings about the court system that might make it unfair to sit here?

P.J. NO. 4: No.

THE COURT: Have you ever served upon a jury before?

P.J. NO. 4: No.

THE COURT: Is there anything I asked earlier of our prospective jurors that applies to you that you would want to give us an answer to?

P.J. NO. 4: No.

THE COURT: Are there any questions of Mrs. Kearns?

MR. COLIN: I have a few questions, your Honor.

Mrs. Kearns, what is the name of the organization for which you work?

P.J. NO. 4: The Buildings Department, Elevator Division.

MR. COLIN: Of the City of New York?

P.J. NO. 4: Yes.

MR. COLIN: Does your work involve holding landlords responsible for repair services?

P.J. NO. 4: Yes.

MR. COLIN: Those are repairs that the City believes the landlord neglected and requires be made at their expense?

P.J. NO. 4: Right.

MR. COLIN: And then your work involves billing the landlord for the money spent by the City for doing this?

P.J. NO. 4: Yes.

MR. COLIN: Has this caused you to form a view that landlords are remiss or deficient in meeting their responsibilities for maintaining properties?

P.J. NO. 4: They are. Some of them pay and some others just get the bills and discard it.

MR. COLIN: You believe then, as you say, that they are deficient and remiss in taking care of property, is that right?

THE COURT: I will disallow that question.

What Mr. Colin is asking you and the way I will put it to you is this: Have you formed, through your work, any feelings about landlords with whom you have had dealings?

P.J. NO. 4: I don't deal with them.

THE COURT: You send inspectors out to inspect the properties. Does this work cause you to have a feeling about landlords that applies tc landlords generally, whether it is an apartment building or whether it is the ownership of property up in Monticello?

P.J. NO. 4: I don't know. I don't know how to answer that. Slme landlords --

THE COURT: Mrs. Kearns, we are dealing here with a claim that certain property that Cities Service Oil had control over was not properly functioning and the concern is that your experience with elevator service in buildings in New York City, does it give you a view about landlords or owners of property generally that would spill over into this case and cause you to lean one way or the other before the case even started?

P.J. NO. 4: If the oil company is responsible, I feel it is their place, just as it is the landlord's place, to pay.

THE COURT: Do you start of thinking that way before the case begins?

P.J. NO. 4: I think so.

THE COURT: I will excuse you. Thank you very much. I appreciate your forthrightness.

THE CLERK: Juror No. 4 is now George Mikula.

THE COURT: Mr. Mikula, you are from East 13th Street in New York City?

P.J. NO. 4: That's right.

THE COURT: How long have you lived there?

P.J. NO. 4: Thirty-five years.

THE COURT: Are you employed?

P.J. NO. 4: Yes.

THE COURT: What do you do?

P.J. NO. 4: I repair tables, billiard tables, and cue sticks.

THE COURT: How long have you been doing that?

P.J. NO. 4: About fifteen years.

THE COURT: Are you married?

P.J. NO. 4: No, sir.

THE COURT: Were you ever married?

P.J. NO. 4: No, sir.

THE COURT: Have you everbeen in a lawsuit of any kind?

P.J. NO. 4: No, sir.

THE COURT: Have you ever served upon a jury before?

P.J. NO. 4: Yes. In civil court and criminal court also.

THE COURT: You heard me ask questions of two prior prospective jurors about prior jury service in criminal and civil cases. Is there any reason why you could not put that experience out of your mind and decide this case only on what you hear here as evidence and on the law as I would charge you?

P.J. NO. 4: I would be honest.

THE COURT: Are there any questions of Mr. Mikula?

(Pause.)

THE COURT: Mrs. Williams, you are from West 42nd Street, New York City?

P.J. NO. 5: Yes.

THE COURT: How long have you lived there?

P.J. NO. 5: Ten years.

THE COURT: And before that?

P.J. NO. 5: New Orleans, Louisiana.

THE COURT: Are you employed?

P.J. NO. 5: Yes.

THE COURT: What do you do?

P.J. NO. 5: I am an office assistant for the Board of Education.

THE COURT: How long have you been with the Board of Education?

P.J. NO. 5: Two and a half years.

THE COURT: What did you do before that?

P.J. NO. 5: I was going to school, back to school, and before that I was a housewife.

THE COURT: When you were living in New Orleans, did you work in New Orleans?

P.J. NO. 5: No. I was home.

THE COURT: What does your husband do?

P.J. NO. 5: We are divorced, but he has his own shop, a radio and television shop.

THE COURT: Do you have any children that work?

P.J. NO. 5: Yes. Two.

THE COURT: Tell me about that.

P.J. NO. 5: The oldest one is married with two kids. He works for Con Edison, and I have another one, younger than he, and he works for Con Edison too.

THE COURT: Have you ever been in a lawsuit?

P.J. NO. 5: Never.

THE COURT: Have you ever served on a jury before?

P.J. NO. 5: This is the first time.

THE COURT: Have you any questions of this woman?

MR. ORSECK: I would like to inquire of Mrs. Williams whether or not she ever had any investment in any oil company?

P.J. NO. 5: No.

MR. ORSECK: Or whether she or any of her family ever worked for an oil company?

P.J. NO. 5: No.

(Pause.)

THE CLERK: The plaintiff waives.

(Pause.)

THE CLERK: The defendant Cities Service waives its challenge.

Mr. Gershenfeld, you are excused.

(Juror No. 3 is now Jean Luminelo.)

THE COURT: Miss Luminelo, you are from East 85th Street in New York City?

P.J. NO. 3: Yes.

THE COURT: How long have you lived there?

P.J. NO. 3: Seven years.

THE COURT: Where were you before that?

P.J. NO. 3: Rhode Island.

THE COURT: Are you employed?

P.J. NO. 3: Yes.

THE COURT: What do you do?

P.J. NO. 3: I work for the real estate division of a bank, Schroeder Trust. It is an English bank.

THE COURT: What do you do in the bank?

P.J. NO. 3: I work in the real estate division.

THE COURT: What is involved in that?

P.J. NO. 3: I am in the accounting end. We acquire and operate commercial properties in North America for overseas investors.

THE COURT: Do you have any connection with oil companies of any kind?

P.J. NO. 3: None.

THE COURT: Have you ever had any connection with any environmental agencies?

P.J. NO. 3: No.

THE COURT: Are you married?

P.J. NO. 3: No.

THE COURT: Have you ever been involved in a lawsuit in any way?

P.J. NO. 3: No.

THE COURT: Have you ever served on a jury before?

P.J. NO. 3: No.

THE COURT: Can you think of any question I

asked an earlier juror that should result in an answer you should be giving us?

P.J. NO. 3: No, I don't.

THE COURT: Are there any questions?

(Pause.)

THE CLERK: Miss Luminelo, you are excused.

Juror No. 3 is now Lewis W. Pongratz.

THE COURT: You are from First Avenue in New York City?

P.J. NO. 3: Yes.

THE COURT: How long have you lived there?

P.J. NO. 3: Twenty-four years.

THE COURT: Whereabouts, in terms of streets, is that?

P.J. NO. 3: That would be 76th Street.

THE COURT: Where did you live before that?

P.J. NO. 3: Five doors away from that.

T HE COURT: Are you employed?

P.J. NO. 3: Not at the moment.

THE COURT: What did you do when you worked?

P.J. NO. 3: I worked for an electronics company.

THE COURT: What did you do for that company?

P.J. NO. 3: Made tape recorders and other

electronic equipment.

THE COURT: You were involved in the assembly of tape records?

P.J. NO. 3: Yes.

THE COURT: How long did you do that type of work?

P.J. NO. 3: About a year and a half.

THE COURT: And before that?

P.J. NO. 3: I was in school.

THE COURT: Where did you go to school?

P.J. NO. 3: RCA Institute, electronic school.

THE COURT: How long were you there?

P.J. NO. 3: About four years.

THE COURT: Are you married?

P.J. NO. 3: No.

THE COURT: Have you ever been involved in a lawsuit?

P.J. NO. 3: No.

THE COURT: Have you ever served as a juror?

P.J. NO. 3: This is the first time.

THE COURT: You heard me ask a lot of questions of others. Is there any question I have asked somebody else that has any applicability to you?

P.J. NO. 3: I don't think so.

THE COURT: Counsel, any questions?

MR. ORSECK: I have one question.

Mr. Pongratz, do you or any member of your immediate family own any real property?

P.J. NO. 3: No.

THE COURT: Do you have any environmental protection connections of any kind that you have heard us ask others?

P.J. NO. 3: None whatsoever.

THE COURT: You have never worked for an oil company?

P.J. NO. 3: No.

MR. ORSECK: I have a further question:

You don't have anything against or any ill feeling towards any environmental group or environmental protection group, do you?

P.J. NO. 3: No.

THE COURT: Either for or against?

P.J. NO. 3: No.

(Pause.)

THE CLERK: Miss Ansalone, Juror No. 2, you are excused.

Juror No. 2 is now Harriet P. Welth.

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THE COURT: You are from West 74th Street?

P.J. NO. 2: Yes.

THE COURT: How long have you lived there?

P.J. NO. 2: About ten years.

#3 THE COURT: Where were you before that?

P.J. NO. 2: West 25th Street.

THE COURT: In New York City?

P.J. NO. 2: Yes.

THE COURT: Are you employed?

P.J. NO. 2: Yes.

THE COURT: What do you do?

P.J. NO. 2: I am a librarian.

THE COURT: What library are you connected with?

P.J. NO. 2: Queens Borough Public Library System.

THE COURT: How long have you been there?

P.J. NO. 2: I started as a trainee at the end of 1962.

THE COURT: Are you married?

P.J. NO. 2: No.

THE COURT: Have you ever been in a lawsuit in any way?

P.J. NO. 2: I was in a slight automobile accident, a slight accident in a taxi, about four years ago.

THE COURT: Did it leave any impression on you about the court system in any way?

P.J. NO. 2: No.

THE COURT: Would it affect you sitting here?

P.J. NO. 2: No.

THE COURT: Have you ever served upon a jury before?

P.J. NO. 2: No. I was called for jury service but I was not chosen to serve as a juror.

THE COURT: Can you think of anything I might have asked an earlier prospective juror that applies to you?

P.J. NO. 2: I have an interest in and am very concerned about the environment, but I don't think that would affect my judgment as to this case or any case.

THE COURT: Have you ever been connected with an oil company in any way?

P.J. NO. 2: No.

THE COURT: Or a bungalow community?

P.J. NO. 2: No.

THE COURT: Are there any questions?

MR. GRUBBS: May I see your Honor at the side bar?

THE COURT: Yes.

(At the side bar.)

MR. GRUBBS: If your Honor please, the most recent juror has expressed the feeling that she is concerned about the environment. That being true, I think the question, since she feels so strongly about it --

THE COURT: I do not think that she says she feels strongly about it. She said that she is concerned.

MR. COLIN: She said "deeply concerned."

MR. ORSECK: Whether or not she did, and it is not my recollection --

MR. COLIN: I think she said "very concerned."

MR. ORSECK: We are very concerned. We all are very concerned, or should be.

I have to concede that the Court's challenge is widely discretionary. What we now have, even without this juror, is almost an adverse selection because anyone who has expressed a great concern with the environment, your Honor, on his own motion has excused, even though each of those excused did say they could be a fair juror.

I am not quarreling, except that I think that what this is getting to be is an adverse selection. I think we are entitled to have people on the jury who are concerned with the environment.

THE COURT: I am concerned as to whether this

would affect her ability to rule on this case. I don't recall that state of the record at this point to justify a challenge for cause by any means.

MR. COLIN: You will develop it further?

THE COURT: I will ask a couple of more questions but not in any great extent.

(In open court.)

THE COURT: Miss Welth, I want to be sure that all sides to this controversy are entitled to have the fairest and most impartial jurors that they could have.

You expressed a view that you were concerned about the environment. I want to know whether or not that concern would, in some way, affect your ability to decide the fact issues here on the evidence that you would hear in this courtroom and on the law that I would charge you, whether that would color your view of that?

P.J. NO. 2: I don't think so. No.

THE COURT: Do you feel you could fairly and impartially decide these fact issues?

P.J. NO. 2: I think so. I would listen to both sides' argument.

THE COURT: And you would decide it fairly and impartially as to all sides?

P.J. NO. 2: Yes. Surely.

MR. COLIN: May I inquire?

THE COURT: No, Mr. Colin. I don't think so. I think that's sufficient.

THE CLERK: Alternate Juror No. 1 is Jeanette J. Barmore.

Alternate Juror No. 2 is Marion Jones.

MR. COLIN: Your Honor, I would like to address an inquiry as to the number of challenges still available to me. I think I have some.

THE COURT: No, I believe not.

MR. COLIN: I waived a round but not the challenge.

THE COURT: The clerk will speak to you on that subject.

(Pause.)

THE COURT: I address myself to Alternates 1 and 2:

You are being considered for the posts of alternate jurors. In the event you have no familiarity with that, let me explain toyou what that means. You have all of the responsibilities of a regular juror but with one possible problem, and that is this: If during the course of the three or four days we are here, one of the regular jurors should, for some reason, for health or act or

otherwise, be unable to attend, one or both of you might be called upon to fill in and carry on as a regular juror. On the other hand, if all six of the regular jurors arrive at the end of the trial in good health and attendance, I would be required to excuse you before the deliberations began.

So an alternate juror has to pay the same careful attention as the case goes along, but the alternate juror may not get to deliberate if that juror's service is not required.

Mrs. Barmore, you are from First Avenue, New York City?

P.A.J. NO. 1: I live at East 124th Street, which is the same development, but we have moved one building.

THE COURT: How long have you lived there?

P.A.J. NO. 1: In the development? Nineteen years.

THE COURT: Are you employed?

P.A.J. NO. 1: Yes.

THE COURT: What do you do?

P.A.J. NO. 1: I am a postal clerk.

THE COURT: With the United States Post Office?

P.A.J. NO. 1: Right.

THE COURT: How long have you been with the Post Office?

P.A.J. NO. 1: Nine years, eleven months.

THE COURT: Did you work before that?

P.A.J. NO. 1: No. I was a housewife.

THE COURT: What does your husband do?

P.A.J. NO. 1: He works for General Motors in New Jersey.

THE COURT: In an assembly plant?

P.A.J. NO. 1: Yes.

THE COURT: How long has he done that?

P.A.J. NO. 1: Twenty-three years.

THE COURT: Do you have any children who are working?

P.A.J. NO. 1: No. They are in school.

THE COURT: Have you ever been involved in a court suit in any way?

P.A.J. NO. 1: No.

THE COURT: Or any member of your family?

P.A.J. NO. 1: No.

THE COURT: Have you ever been on a jury before?

P.A.J. NO. 1: Yes.

THE COURT: In this courthouse?

P.A.J. NO. 1: No. In the one on Centre Street.

THE COURT: Criminal Court Building?

P.A.J. NO. 1: Yes.

THE COURT: You heard me ask somebody before as to whether or not they went to a verdict on the case?

P.A.J. NO. 1: Yes.

THE COURT: The judge instructed you about reasonable doubt, right?

P.A.J. NO. 1: Right.

THE COURT: I am not going to instruct you about reasonable doubt. I am going to instruct you about fair preponderance of the evidence. You put out of your mind any charge of another judge applicable to a criminal case if you are chosen here; do you understand that?

P.A.J. NO. 1: Yes.

THE COURT: In other words, you put that from you because that standard you do not apply. Do you understand that?

P.A.J. NO. 1: Yes.

THE COURT: You will have no trouble putting those earlier charges out of your mind?

P.A.J. NO. 1: None whatsoever.

THE COURT: Are there any questions of this juror?

(Pause.)

THE COURT: Mrs. Jones, you are from 96th Street?

P.A.J. NO. 2: Yes.

THE COURT: How long have you lived there?

P.A.J. NO. 2: A year and ten months. In the area, nineteen years.

THE COURT: Are you employed?

P.A.J. NO. 2: No.

THE COURT: Have you been employed in the past?

P.A.J. NO. 2: No.

THE COURT: Are you married?

P.A.J. NO. 2: Yes.

THE COURT: What does your husband do?

P.A.J. NO. 2: He drives a truck for the Salvation Army.

THE COURT: How long has he done that?

P.A.J. NO. 2: About a year.

THE COURT: And before that?

P.A.J. NO. 2: A garage attendant.

THE COURT: How long was he a garage attendant?

P.A.J. NO. 2: About twelve or fourteen years.

THE COURT: He worked for some franchise -kind of company?

P.A.J. NO. 2: It was a parking area for, like, a development.

THE COURT: Do you have any children that are working?

P.A.J. NO. 2: No.

THE COURT: Have you ever been in a lawsuit?

P.A.J. NO. 2: No.

THE COURT: Has your family ever been in a lawsuit?

P.A.J. NO. 2: No.

THE COURT: Have you ever served as a juror?

P.A.J. NO. 2: No.

THE COURT: Addressing both you and Mrs. Barmore, have either of you been involved in environmental causes in any way?

P.A.J. NO. 1: No, your Honor.

P.A.J. NO. 2: No, your Honor.

THE COURT: Have you ever worked for an oil company?

P.A.J. NO. 2: No, sir.

THE COURT: Have you ever served on a jury before?

P.A.J. NO. 2: No.

THE COURT: Are there any questions?

(Pause.)

THE CLERK: The plaintiff waives a challenge.

(Pause.)

THE CLERK: Mrs. Barmore, you are excused.

Alternate Juror No. 1 is now John H. Lapadula.

THE COURT: You live in Mount Vernon?

P.A.J. NO. 1: Yes.

THE COURT: How long have you lived there?

P.A.J. NO. 1: Twenty-six years.

THE COURT: Are you employed?

P.A.J. NO. 1: Retired.

THE COURT: What did you do?

P.A.J. NO. 1: I worked for Con Edison.

THE COURT: What did you do for them?

P.A.J. NO. 1: Electrician.

THE COURT: How long?

P.A.J. NO. 1: Thirty-seven years.

THE COURT: Are you married, sir?

P.A.J. NO. 1: Yes.

THE COURT: Did your wife ever work?

P.A.J. NO. 1: Somewhat. A little bit.

THE COURT: What kind of work did she do?

P.A.J. NO. 1: Waitress.

THE COURT: Do you have any children that are

employed?

P.A.J. No. 1: Two.

THE COURT: What do they do?

P.A.J. NO. 1: One works as a tax counsel for a firm in New Jersey.

THE COURT: And the other?

P.A.J. NO. 1: He is out in California. He is a musician.

THE COURT: Have you ever been connected with any environmental agency, or any association or do you have feelings about the environment, one way or the other?

P.A.J. NO. 1: No.

THE COURT: Have you ever had any connection with any oil companies?

P.A.J. NO. 1: No.

THE COURT: Have you ever been involved in a lawsuit?

P.A.J. NO. 1: No.

THE COURT: How about your family?

P.A.J. NO. 1: No.

THE COURT: Have you ever served as a juror before?

P.A.J. NO. 1: I have.

THE COURT: What kind of cases?

P.A.J. NO. 1: Criminal cases.

THE COURT: Was this recently?

P.A.J. NO. 1: Two years, White Plains.

THE COURT: Did you go to a verdict?

P.A.J. NO. 1: Hung jury.

THE COURT: In any event, you did deal with the standard of reasonable doubt as you heard me talk about with others?

P.A.J. NO. 1: Yes.

THE COURT: Is there any reason why you could not put that from your mind and apply the law as I would charge you?

P.A.J. NO. 1: No.

THE COURT: You could do that?

P.A.J. NO. 1: Yes.

THE COURT: Are there any other questions I might have asked an earlier prospective juror that triggers off an answer in your mind?

P.A.J. NO. 1: None that I know of.

THE COURT: Are there any questions of this gentleman?

MR. ORSECK: I have one or two.

Sir, I think from time to time it has come to the knowledge of all of us that there have been complaints

against Con Ed, pollution types of complaints. Does that in any manner whatsoever affect your ability to sit in this case and decide the issues as they should be decided?

P.A.J. NO. 1: Not at all.

MR. ORSECK: Thank you.

MR. COLIN: Your Honor, before the jury is sworn, may I approach the bench and place a statement on the record?

THE COURT: You may.

(At the side bar.)

MR. COLIN: Your Honor, I would want to exercise a peremptory challenge as against Juror No. 2, and I have been informed by your Honor and the clerk that I no longer have it. I would like to note, for the record, my exception to that ruling, sir.

THE COURT: It is not a ruling, it is a fact.

(In open court.)

(The jury was sworn at 12:15 p.m.)

(The remainder of the panel was excused.)

THE COURT: For those of you who are here for the first time, what happens in a civil trial is approximately as follows: We are going to take a recess for four or five or six minutes. The clerk will show you where the jury room is, where you hang your coats and where

you report after lunch and in the morning. When you come back we will start with the opening statements of the lawyers.

Following the opening statements of the lawyers, we will hear the plaintiff's proof.

Following the plaintiff's proof we will hear the proof on behalf of the defendant and the third-party defendant.

After that we will hear plaintiff's rebuttal proof, if any is desired.

Following that, the lawyers will make their closing arguments or their summations to you, and then I will charge you on the law.

Then, and only then, do you commence deliberating to reach your verdict.

We will sit from ten in the morning until about one o'clock, and then from two or a little after, until four-thirty when we recess. Sometimes we may sit a few minutes beyond that.

May I point out the obvious: Please be prompt because we cannot start unless we are all here. You are not a jury until all of you are together. Sometimes at the beginning of the session the lawyers have matters of

law that they want to bring to my attention and we might have to hold you for a few minutes; but, to the best of our ability, we will start promptly at the appointed hour.

During the course of this trial I want you to keep an open mind all the way, all the way from the beginning to the end. Do not conclude from hearing one witness that you know all about the case, because what you may learn from a later witness may add to or subtract from what you thought you learned from the earlier witness. Don't even conclude from hearing only the direct examination of a witness that you know all about it because cross-examination may add to or subtract from what you learned from that witness on direct examination.

Please do not discuss the case as we go along with each other or with anybody else. The reason for that, quite simply, is that if you begin to express opinions, something may happen later on and may make you want to change that opinion. If you already have expressed an opinion you may feel you have to defend it rather than be in a position to give attention to another view. Resist the temptation to go home to your husband and wife and say, "Dear, I am on an interesting case and let me tell you about it." Say, "The judge has asked me not to talk and I will talk to you about the case when it is all over.

Until then I am not going to discuss the case."

Talk about the upcoming basketball season or the new president or the state of the economy, but do not talk about the case.

You are to draw no inferences from any objections the lawyers are going to make during this trial. That's their duty, to make objections if they feel that it is appropriate. You are not to draw any inferences from any rulings I make on the objections. Those are matters of law that are my province as a judge.

The openings and the summations, the lawyers' arguments to you, they are not evidence nor are any questions to which an answer is not permitted. The only evidence in the case are the answers to questions and documents you have before you. You are to decide this case only on the evidence: that is, the answers to questions or documents properly admitted, or the lack of them.

One final thought before we have our brief recess: In becoming jurors in this case you keep your common sense with you and apply that common sense at all times. You do not leave it in the hallway just because you became a juror.

I will see you in a few minutes.

(Recess.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DORALEE ESTATES, INC., a New York Corporation, Plaintiff,	Before: HON. RICHARD OWEN, District Judge.
vs.	
CITIES SERVICE OIL CO., a Delaware Corporation, Defendant and Third-Party Plaintiff,	73 Civ. 907
vs.	
MGO CORP. and MONTICELLO GAS & OIL CO., INC., Third-Party Defendant.	

New York, January 3,4,5, 1977

STENOGRAPHER'S MINUTES

1 pgem

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 ----------x

5 DORALEE ESTATES, INC., a :
New York Corporation,
6 Plaintiff, :

7 v. : 73 Civ. 907

8 CITIES SERVICE OIL CO., a
Delaware Corporation, :
9 Defendant and Third-
Party Plaintiff, :

10 v. :

11 MGO CORP. and
MONTICELLO GAS & OIL CO., INC., :
12 Third-Party Defendant.
:

13 ----------x

14 B e f o r e: HON. RICHARD OWEN, District Judge.

15 New York, New York
January 3, 1977 - 10:25 A.M.

16

17 APPEARANCES:

18 GERALD ORSECK, Esq.,
Attorney for Plaintiff.

19 BAER & MARKS, Esqs.,
Attorneys for Defendant Cities Service,
20 By: GEORGE H. COLIN, Esq., of Counsel.

21 GRUBBS & SUTERA, Esqs.,
Attorneys for MGO Corp.,
22 By: ROBERT M. GRUBBS, Esq., of Counsel.

23

24 Also Present: JEFFREY L. LIDDLE

25

(In the robing room.)

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: I am allowing the defendant and the third-party defendant each an extra challenge to be exercised separately if they so desire. Mr. Colin excepts to that.

MR. COLIN: As I understand what you are allowing, sir, you are allowing the defendant and the third-party defendant three challenges between the two of them.

THE COURT: Section 1870 allows each side three peremptory challenges. I am in discretion, because it says "may allow additional" one each to each defendant.

MR. COLIN: Does that mean, your Honor, that Cities Service will have the three allowed challenges plus the additional one?

THE COURT: That means that the first round will be one for the plaintiff and one collectively for Cities Service and the third-party defendant, and one individually for Cities Service.

The second round would be plaintiff, and then one individually for the third-party defendant and one collectively for both.

The third round, you will have one, and the defendants will have one collectively.

MR. COLIN: May I note my exception to your Honor's ruling.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: On the record.

Mr. Colin, I will give your three, four, twelve, and thirteen in some form. The balance of them have to do with evidence and I will charge the jury appropriately at the close of the case.

Mr. Grubbs, I am going to similarly give your 1, 2, 3 -- I will ask all in substance. They are all appropriate, in my opinion, for the jury selection. I will be touching upon those.

Gentlemen, thank you very much.

MR. ORSECK: I have one question: Do you have any policy about quitting time in the afternoon?

THE COURT: Roughly four-thirty.

MR. ORSECK: I wanted to figure out whether to stay or not.

THE COURT: If there is a witness on that we can get rid of if we go a few extra minutes, I will go close to five; but I generally quit at four-thirty.

MR. ORSECK: Today it is conceivable that I might run out of proof. I am not talking about early in the

afternoon. My witnesses have to come down, but I will finish the plaintiff's case tomorrow.

MR. COLIN: I have a trial memorandum for you, your Honor.

THE COURT: If you will give me your charges I will give them to my law clerk.

MR. GRUBBS: We have submitted them, your Honor.

MR. ORSECK: We filed them back in July, your Honor.

MR. COLIN: Here are mine, your Honor.

(In open court.)

(A jury of six and two alternates were duly impaneled and sworn.)

THE COURT: For those of you who are here for the first time, what happens in a civil trial is approximately as follows:

We are going to take a recess for maybe four, five, or six minutes. The clerk will show you where the jury room is, where you hang your coats, and where you report after lunch and in the morning.

When you come back we will start with the opening statements of the lawyers. Following the opening statements we will hear the plaintiff's proof.

Following the plaintiff's proof, we will hear

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the proof on behalf of the defendant and the third-party defendant.

After that we will hear plaintiff's rebuttal proof, if any is desired.

Following that the lawyers will make their closing arguments or their summations to you.

Then I will charge you on the law.

Then, and only then, do you deliberate to reach a verdict.

Normally we will sit from ten in the morning until about one o'clock, and from two to a little after four-thirty. Sometimes we might sit a few minutes beyond that.

May I point out the obvious: Please be prompt because we cannot start until we are all together. You are not a jury until all of you are together.

Sometimes, at the beginning of a session, the lawyers have matters of law they want to bring to my attention, and we have to hold you for a few minutes; but to the best of our ability we will start promptly, as promptly as we can, at the appointed hour.

During the course of this trial I want you to keep an open mind all the way from the beginning to the end. Do not conclude from hearing one witness that you know all about the case, because what you may learn from a later

witness may add to or subtract from what you thought you learned from the earlier witness. Don't even conclude from hearing only the direct examination of a witness that you know all about it, because cross-examination may add to or subtract from what you learned from that witness on direct examination.

Please do not discuss the case as we go along with each other or with anybody else. The reason for that, quite si[illegible] is that if you begin to express opinions and something happens later on, you may want to change that opinion. If you have already expressed the way you feel you will have to defend that rather than be in a position to get a tentative view another way.

Resist the temptation to go home to husband and wife and say, "Dear, I am on an interesting case; let me tell you all about it." You are to say that the judge has asked you not to talk and that you will talk about the case when it is over.

Talk about the upcoming basketball season or the new president or the state of the economy, but do not talk about the case.

You are to draw no inferences from any objections that lawyers are going to make during this trial. That is their duty to make objections if they feel that it is

appropriate. You are not to draw any inferences from any rulings I make on the objections. Those are matters of law that are my province as a judge.

The openings and summations, the lawyer's arguments to you are not arguments, nor are any questions to which an answer is not permitted. The only evidence in the case are the answers to questions and documents you will have before you, and you are to decide this case only on the evidence, that is, the answers to questions or documents properly admitted, or lack of them.

One final thought before we have our brief recess: In becoming jurors in this case you are to keep your common sense with you and apply it at all times. You do not leave it in the hallway just because you became a juror.

I will see you in a few minutes.

(A short recess.)

(Jury in box.)

THE COURT: You may proceed, Mr. Orseck.

MR. ORSECK: If the Court please, and ladies and gentlemen of the jury:

This is an action brought by my client, Doralee Estates, Inc., a New York Corporation, whose principal stockholder is the lady seated to my left, Dora Huss, who lives here in New York.

Back in the middle 1960s that corporation was formed to buy a bungalow colony located up in Sullivan County, Monticello.

You will hear from the witnesses what the bungalow colony is like. It is not an elaborate place. It consists of roughly seventy-some-odd units which are not winterized, where vacationers come up and rent a bungalow for the summer months, July and August, and enjoy, theoretically, boating, fishing, et cetera.

Some time after Doralee bought the property -- and they paid approximately $70,000 for the property -- they discovered that its neighbor across the street, a bulk oil plant owned by Cities Service Oil Company, was operating in such a manner that frequent and substantial oil spills from the trucks and from the big tanks that were suspended up in the air went into the Cities Service property, seeped into a ditch, went through a culvert, and found their way into Doralee's lakes.

We will show that this was a substantial amount of oil over a long period of time.

In the late 1960s Doralee, through a different lawyer, a different law firm up in our neck of the woods, Oppenheim & Drew, commenced an action against Cities Service and claimed to some extent what she is claiming now; that

action was not brought in a federal court, it was brought in the state court, the Supreme Court of the State of New York up in Sullivan County.

We will show that the defendant, Cities Service, and the third-party defendant, Monticello Gas & Oil, conned her into a settlement for a small amount of money, some $12,000, period. When I say "conned her," they entered into a written agreement which was part of the settlement that she could not sue any more if within sixty days they submitted plans to rectify the situation, and within six months they did rectify the situation.

What is the strongest type of proof? The strongest type of proof are the statements, the admissions, of the people who are being sued through written admissions that we obtained through discovery proceedings, and I will tell you what discovery proceedings are in just a minute.

Needless to say, the six-month period came and went and they didn't do a thing. They didn't do a thing.

I should not say that they didn't do a thing. They accelerated pollution. They dumped more and more oil in spite of a court judgment that was made in the Supreme Court on their consent that they would cut it out.

It got so bad that the New York State Environmental Agency caused an investigation to be made. They are

not the plaintiff in this case. Doralee is the plaintiff. They are what is known as a disinterested witness. We have documents which prove not only the extent of this pollution, but the fact that in the vernacular Cities Service as much as told the State of New York and the plaintiff, "Go to hell. We are not going to do anything unless we are good and ready, and if we are good and ready we will do it."

MR. COLIN: May I suggest this is not a proper opening.

THE COURT: Please tell the jury what it is you expect to prove, to show, and let the proof speak for itself.

MR. ORSECK: We will show through documents prepared by Cities Service employees and signed by them that they engaged in a subterfuge with Monticello Gas & Oil to try, in addition to conning us, to con New York State into not knowing that Cities Service was behind the whole thing. We have admissions by Cities Service that that's just what they did, and we have in documentary proof the reasons that they did it. The reason we will show you is that the New York State Agency only would fine Monticello Gas & Oil -- Cities Service' tenant-operator -- $500 a violation, and if Cities Service was in it they would have fined them $2500 a day. So Cities Service -- it is like the Watergate --

MR. COLIN: Your Honor, I rise to the same objection.

THE COURT: Sustained.

MR. ORSECK: It is not because I am telling you this. You will hav e those documents in evidence.

THE COURT: Ladies and gentlemen, as I think I mentioned to you before, but I will say it again, what the lawyers say to you is not evidence. It is what they expect to prove, to show. They were not there and I was not there. You keep in mind the framework in which each counsel is speaking.

MR. ORSECK: Ladies and gentlemen, obviously, in any civil case, as at this juncture of the case, the starting point, I think the judge mentioned in his introductory remarks, the lawyers, of course, know a lot more because they have been living with the case since the commencement.

The federal rules provide lawyers who represent people in civil cases to conduct what is called discovery proceedings, and discovery proceedings consist mainly of two manners of obtaining knowledge of the case before the trial. One method is to subpoena witnesses, parties, who have knowledge --

THE COURT: Just tell the jury what you expect to prove, what you are going to show, and then you get down

to where it is expected to come from. We will then deal with that.

MR. ORSECK: We will show that as a result of the pollution of the ponds, the lake and the pond belonging to Doralee, at some later date when the lake and pond were drained for another reason, tests were made to the subsoil to see how deep the oil permeated. We will produce a contractor and a member of the State Agency who verified the existence of the oil under the lake, and we will tell you how much it will cost to restore those premises to the condition that they were in before there had been pollution.

We also intend, and we will, prove to you that Doralee, years before, had made an agreement with a state subagency to permit her to stock the lake with fish. There was one day when there was a horrible fishkill, which means there were literally thousands of fish killed by the oil pollution and the lake insofar as fish and swimming is concerned, unless any great sums of money are spent to dig it all out, not only on her property but in an adjoining swamp, the lake will never be the same.

We intend to prove that under the law we are entitled to be recompensed for all of these damages, for the loss not of rents but of increases in rents. It is true: You will find in this case that virtually every year she

managed to rent the bungalows, almost all of them each year. You are also going to find out there were small increases each year, but you will hear proof that the rents could have been much larger and could have gone up commensurate with the way rents go up every place else had it not been for this pollution.

We will also show you that there had been some minor problems which the defendants no doubt will try to use -- I don't know how -- as an excuse for their conduct. Some of the neighbors' septic tanks broke and dumped some effluent in the lakes, but that was cleaned up and cured. How that helps the defendants, that's going to be their obligation to prove to you.

Most importantly, at the end of the case, if the Court permits, and if we are successful in showing you that Cities Service's conduct was not just carelessness, that it was deliberate and it evinced or showed a callous disregard for the rights of others, for orders of the State, we may be entitled to punitive damages; that is damages we will seek to punish the defendant, to deter the defendant, from doing this again any place else where they may have these bulk plants and they operate them in such a manner.

Prior to the conclusion of the opening statement, if I may elaborate for a moment on the Judge's

preliminary instructions, this action is Doralee against the Cities Service Oil Company. Cities Service Oil Company -- I don't think there is any question -- owned the property upon which this bulk plant was located. Cities Service leased the premises to Monticello Gas & Oil, which is called a commission agent. In other words, they sell Cities Services' products --

MR. GRUBBS: If your Honor please, I will object to the going into the third-party action by plaintiff's counsel. He is restricted to his own claim and each and every attorney will respectively state their position.

MR. ORSECK: May I be heard?

THE COURT: I will let you go along for a reasonable distance.

Overruled.

MR. ORSECK: In other words, Monticello Gas & Oil sold only Cities Service's products and they would get so much a gallon for selling it, and it was all for the ultimate benefit of Cities Service. In that lease there is a clause that says that in the event that Cities Service is held liable for hurting somebody else's property, damaging property, Cities Service may be held by the Court to have to pay the --

MR. GRUBBS: Objection. This is none of the

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2 plaintiff's concern.

3 THE COURT: You don't need to get into this.

4 This has to do with the relationship of the ownership of the

5 land and the leasing of the land.

6 MR. ORSECK: All right.

7 Suffice it to say that Cities Service in this

8 action sues Monticello Gas, their contention is that if we

9 have to pay Doralee anything we want to get it back under

10 the lease or under some theory against you.

11 The reason I mention that is so you can view

12 the case in a more intelligent frame. You can understand

13 who is here and for what purpose.

14 Again, you have been admonished by the Court,

15 most properly so, that what the lawyers say just doesn't mean

16 anything. It is not proof. I was not there when the oil was

17 dumped, nor was I there when it was not dumped, and neither

18 was Mr. Colin or Mr. Grubbs. You are going to have to hear

19 the proof. You are going to have to size up witnesses on the

20 stand and consider such proof as the Court permits to be

21 received in evidence.

22 I am quite confident that when I told you that

23 the plaintiff expects to prove the things I have just men-

24 tioned to you, not only will we prove them, but ninety per-

25 cent of it or better will be proved by writings which the

defendants themselves signed, and also by reports kept by various agencies of the State of New York.

There really isn't much more to the case except the request of all counsel, and undoubtedly the instruction of the Court, that all of you keep an open mind and listen to the evidence very, very carefully. There will be more from the Court and from the lawyers at the conclusion of the case.

Thank you for your attention.

(Continued on next page.)

MR. COLIN: If it please your Honor, ladies and gentlemen of the jury:

It has been stated to you and it is the fact that this is a case brought by Doralee Estates v. Cities Service Oil Company. It was stated to you that this is a case where the plaintiff claims, the plaintiff being Doralee Estates, that the property owned by Cities Service Oil Company, the oil storage plant, was operated in such a way that it caused oil ultimately to reach the plaintiff's premises.

It was not stated to you that Cities Service Oil Company will be shown to have been the operator and party in control of that oil plant and, indeed, on this point, which is crucial, the heart of the case, we will show to you that the contrary is the fact.

We will show to you that Cities Service Oil

(Continued on next page.)

Company, which has its offices in Tulsa, Oklahoma, leased this oil plant in 1965 to the Monticello Gas & Oil Company.

We will show to you the written document representing the leasing of that plant to the Monticello Oil & Gas Company and its provision which places the responsibility for repair and maintenance of the premises on the Monticello Gas & Oil Company.

We will show to you that Cities Service Oil Company had no personnel employed or resident at the premises in question; that these premises were occupied and operated solely and exclusively by Monticello Oil & Gas Company.

There has been reference in Mr. Orseck's opening statement to the fact that a prior action between the parties was settled. His Honor will instruct you as to the effect and meaning of that settlement, but I referred to the settlement for a very important reason, and that is that the settlement culminated in a general release, a written document, given by Doralee Estates, the plaintiff in this action, to Cities Service Oil Company and to Monticello Gas & Oil Company wherein Doralee Estates released all claims of any nature whatsoever up to October 24, 1972.

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We will show to you, ladies and gentlemen, that after October 24, 1972, there were no circumstances, acts or events which represented an additional cause of damage. Indeed, we will show you that the operation of the oil plant terminated on or about February 1, 1973, which is only about three months after the effective date of the release that was given to Cities Service and Monticello Gas by Doralee.

That's the period that we consider to be the area of claim and claimed injury in this case, and it is three months.

We will show you that not only were operations discontinued at the terminal -- Monticello Gas & Oil Company moved to another location -- but we will show you that the soil, the surface of this oil terminal property, was bulldozed and dug up with steamshovels, backhoes, and removed and transported off the premises and a new top surface was applied to that premises.

Indeed, all the tanks and all the equipment were torn down. This was all accomplished by or before June of 1973.

It is our intention to show not only the small scope encompassed, the few months between the date of the release and the date this whole thing terminated, but also

to show, as I initially indicated, that the premises for the entire period of years from 1965 until they ceased to exist as an oil plant were at all times continuously under the control and operation of Monticello Gas & Oil with no presence of Cities Service represented there.

We believe that under those circumstances, City Service can have no liability; you be guided, of course, by what his Honor may instruct you in that regard.

But we have, as was indicated to you, a claim against Cities Service Oil Company which is in the nature of a contingent claim, and the claim is that if Cities Service for any reason should be held liable to this plaintiff then Cities Service says that the Monticello Gas & Oil Company is liable to Cities Service to the same degree and extent.

The reason for that, among others, is that the lease document, the document whereunder Cities Service turned over these premises to Monticello Gas & Oil Company, contains an express provision that Monticello Gas & Oil Company will indemnify and defend and hold harmless Cities Service from any claims of this nature.

That is all lawyers' language, but what it really means in simple terms is that they will make good to Cities Service anything that Cities Service may be held

accountable for in this case.

Indeed, we will prove to you that we called on Monticello to defend us in this case because they were the operators and not we. We asked them to supply counsel to us and we are going to ask, if the appropriate time comes, that we be made good, made whole, on the expense that we put out for the defense of this case which we say should have been undertaken in the first instance by Monticello for our account.

That, very briefly, sketches the proof that will be offered on our part.

I have painted a very brief and lean picture. I have not embellished it, but the proof as it is developed will fill you in on more details.

Thank you very much.

MR. GRUBBS: May it please your Honor and ladies and gentlemen:

At the outset I would like to repeat and reemphasize that what all previous counsel have said is merely their version of what they would like you to believe. Nothing that was said constitutes any evidence at all, nor is anything that was said entitled to be given any weight in determining what occurred, how it occurred, where it occurred, what caused it to occur, who was

1 responsible for it, whether the plaintiff corporation
2 itself was at fault or contributed to what occurred, and
3 what in fact resulted from the occurrence.
4 I would prefer to have you make up your own
5 minds after hearing all the evidence, and for that
6 reason I respectfully request that you observe the
7 witnesses carefully, not only as to what they say and the
8 manner in which they say it, which is important, but even
9 more important, to what extent what they say is consistent
10 with the physical facts, to what extent what they say is
11 consistent with what they said at other times or what
12 they did or failed to do and, most important of all, to
13 what extent what they say is consistent with their good
14 common sense and judgment and experience.
15 MR. ORSECK: This has nothing to do with an
16 opening statement. It is a lecture on how to weigh
17 evidence.
18 THE COURT: I will permit it.
19 I take it you are about finished with that
20 aspect anyway.
21 MR. GRUBBS: Yes, your Honor.
22 It is easy to be swayed or influenced by
23 prejudice, but it takes real alertness to find the true
24 facts and apply the governing laws as it will be given to
25

1 you by this honorable Court and only by this honorable
2 Court. When any of the lawyers talk about legal duties
3 or documents or indemnity agreements, it is meaningless.
4 The only law you are going to get as to whether or not
5 there is such a valid agreement and whether any such
6 provision in this state is valid comes from the Court and
7 the Court alone. What the lawyers say about the law is
8 meaningless. It is only what the Court says and the Court
9 alone will instruct you as to duties or whatever the law
10 governs, you will get it from the Court and the Court alone.
11 I respectfully submit that the plaintiff did
12 not sustain the damages he is claiming as a result of
13 fault by my client.
14 I further respectfully submit that the evidence
15 will show that the plaintiff corporation's own fault and
16 negligence or failure to exercise due care and prudence
17 contributed to whatever occurred.
18 I think that there will be no question that
19 the evidence will show that the plaintiff has received
20 and retained to this very day compensation for the
21 damages she sought and received by settlement in the
22 Sullivan Supreme Court action.
23 There was some reference as to whether or not
24 the plaintiff was conned into the settlement. I think the
25

evidence will show that the settlement, the stipulation, was arrived at in open court before a Supreme Court judge and after there had been extensive and deliberate consultation between the plaintiff corporation and her attorney and among all the parties to the lawsuit.

The plaintiff was represented by counsel, so there is no question of anybody being conned. It was an open court settlement, before the Court, with the attorneys representing all parties, after great deliberation.

I further respectfully submit that the evidence in this case would show that the plaintiff corporation purchased some bungalows in a low lake area. In that low lake area there was some swamp and marshlands draining into the ponds. I think the evidence, I respectfully submit, will show that at the time the plaintiff corporation bought that low land, they were aware of the existence of the adjoining installations and premises including the oil depot.

I respectfully submit that the evidence will show that the plaintiff, even before there was any complaint of any oil, did not operate that particular bungalow area with any profit.

I respectfully submit that the plaintiff knew that the corporation pond was being polluted by sewerage

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coming from her own bungalows as well as from the bungalows of the other residents and installations in the area. Therefore, I respectfully request and trust that each of you will faithfully discharge her or his oath as juror and apply the true facts and the governing law, and return a verdict in accordance with the facts and the law.

THE COURT: Ladies and gentlemen, we will recess for lunch and resume at ten minutes past 2.

(Luncheon recess: 1:10 p.m.)

(Jury in box.)

(At the side bar.)

MR. COLIN: Your Honor, we have, as I stated to you, a release for all acts and claims up to September 24, 1972. Anticipating his proof may come in without a time frame that is limited to what is after that date, because I don't want to continuously interrupt, I am bringing to your Honor's attention the advisability, perhaps, of taking the release into evidence now so that there is a predicate for limiting the plaintiff's proof of its claims to the time period after October 24, 1972.

THE COURT: The plaintiff's claim here, as I understand it, in part, is that the release was obtained under deliberately deceptive circumstances and, therefore, it was ineffective as a release.

MR. ORSECK: Either you will let it go to the jury or you will dismiss it and instruct them accordingly.

MR. COLIN: The second thing I would suggest to your Honor is that it may be highly prejudicial to Cities Service if proof of events come into this case before anything is adduced connecting Cities Service to the operation and control of the oil plant. I think the plaintiff, before it proves what it claims are the events --

THE COURT: It seems to me if your client is

connected sometime during the plaintiff's case it is, and, if not, there will be a dismissal.

MR. COLIN: I thought it might help.

(In open court.)

MR. ORSECK: I call Robert Rosch.

R O B E R T R O S C H, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

xx BY MR. ORSECK:

Q Where do you live?

A Liberty, New York.

Q How old are you?

A Thirty-seven.

Q How long have you lived in Liberty?

A Thirty-seven years.

Q What is your education, quickly?

A Two years of college.

Q Where?

A ASU.

Q What is your present occupation?

A I am an engineer, a construction engineer, contractor.

Q Are you also in the construction business?

A Yes.

Q What is your trade or business name?

A Rosch & Weston Contractors, Inc.

Q Where is your place of business?

A Clement Road, Liberty.

Q Were you in that business in the fall of 1972?

A Yes.

Q During the recess, at my request, the document in front of you was marked for identification; is that correct?

A Yes.

Q That came from your file, in your possession?

A Yes.

Q On September 19, 1972, did you have occasion to visit the premises known as Doralee Estates at Cold Spring Road, Monticello, New York?

A Yes, I did.

Q Would you tell the jury what the circumstances were that caused or precipitated your presence there at that time?

A Well, upon arriving at the --

MR. COLIN: For reasons previously advanced to your Honor, the defendant Cities Service objects to proof of any events antedating October 24, 1972.

THE COURT: At this point I will allow it.

Overruled.

MR. GRUBBS: May I have an objection, joining in that?

THE COURT: You may move at a later point for further relief should the occasion be warranted, as we discussed at the side bar.

You may proceed.

A Upon arriving at the job location --

Q The question, Mr. Witness, is this: How did your presence come about to be?

A I was called by the property owner to inspect the job site.

Q When was the call?

A Around the 19th.

MR. COLIN: I move to strike the answer. It states a conclusion. It is not fact. There is no identification of the person who called him.

THE COURT: I assume he went out there because somebody telephoned him and asked him to go out.

The objection is overruled.

Q Do you remember who called you?

A Mrs. Huss.

Q When you got out there did you see her?

A Yes.

Q Did you see anybody else out there at that time?

A There was a representative from the Department of Environment Conservation.

Q Is he in this room at this time?

A Yes, he is.

Q What did you do when you went out there on the 19th of September, 1972?

A I inspected the job site.

Q What job site?

A Two lakes that the owner had that were drained, oil had drained into these lakes or ponds -- however we want to classify them.

Q What was the purpose of your inspection?

#2 A There was an oil spill there that had drained onto this person's property.

MR. COLIN: Objection. I move to strike, your Honor.

THE COURT: Strike out the characterization at this point.

Mr. Rosch, you went to Doralee Estates. What did you see? You saw a couple of drained lakes. Tell us what they looked like, what you saw, and so on.

THE WITNESS: If you can visualize a drained pond, or a drained lake, it is empty, it doesn't have any

water in it.

THE COURT: What are the measurements? We were not there and you were.

THE WITNESS: Lake No. 1 was approximately three acres; lake No. 2 was about three quarters of an acre.

So we inspected lake No. 1, the three-acre lot.

Q What did your inspection consist of?

A Well, I got a shovel out of my pickup that I always carry. I dug some little holes in the ground to the depth where the oil had penetrated and then I went down to the lower lake.

Q Let's talk about the upper lake for a minute.

Was the man from the New York State Conservation Department with you?

A Yes, he was.

Q Each time you dug in that upper lake did you make a notation as to where the hole was dug?

A Yes.

Q What else did you record with respect to each hole, if anything?

A The depth of the hole.

Q Did you dig to any particular depth at each location?

A Yes.

Q How far down did you dig?

A Each location was a little different. It is stated here.

Q Why was each location different?

A Because of the slope of the pond and the depth of the oil that had penetrated into the pond.

MR. COLIN: I object to that. I move to strike.

THE COURT: Overruled.

You may cross-examine.

Q In other words, you dug down at different locations to see how deep the oil had penetrated the floor of the lake?

MR. COLIN: Objection.

MR. GRUBBS: Objection as to form.

THE COURT: Sustained.

How many holes did you dig?

THE WITNESS: The upper pond, four.

THE COURT: What kind of depths did you go to?

THE WITNESS: I have the measurements marked down. Would you like me to read them off?

THE COURT: Do your records show?

THE WITNESS: I need the other topography map.

MR. ORSECK: It is there.

THE WITNESS: This is on the three-acre lake

that I dug four spots.

MR. COLIN: Your Honor, is the witness reading from an unidentified document?

THE COURT: You are correct.

Mr. Rosch, is this a document you prepared at the time?

THE WITNESS: This is a topography map. It was given to me.

THE COURT: Did you have that with you at the time?

THE WITNESS: The Environmental man had it.

THE COURT: And he made marks as you went along?

THE WITNESS: Yes.

THE COURT: Overruled.

Go ahead.

THE WITNESS: In the upper lake we dug four spots. I can tell you the depths: four inches, four inches, five inches, and seven inches.

Q Four inches meant what?

A A four-inch percolation hole into the bottom of the lake which would be the muck.

Q What did you find within that four inches?

A It was saturated with oil.

MR. COLIN: I object to that. I move to strike.

THE COURT: Overruled.

You may cross-examine.

Q Is it fair to say below four inches at that particular hole you didn't see any oil?

MR. COLIN: Objected to as leading.

A Fairly good.

THE COURT: Overruled.

Q You repeated that test four times on the upper lake, you said?

A Yes, sir.

Q Did you do roughly the same thing at the lowe- lake?

A Three times. Same purpose.

Q What were your findings as to how deep the oil was in the lower lake?

MR. COLIN: That is objected to. There is no proof of this man's qualifications to have any findings in this regard.

THE COURT: Overruled.

A The lower lake two holes, seven inches deep.

Q What were you asked by the owner of the property to do at the site?

MR. COLIN: Objected to.

THE COURT: While the objection is normally

well taken, in this case I will overrule it.

A To excavate the oil-soaked bottom of the pond, the oil-soaked muck.

Q Did you determine price or an estimate to remove what you would determine to be the oil-soaked bottom of the lake?

A Yes, I did.

Q Would you tell the Court and the jury how much your estimate was and, part two, how you arrived at it.

A Number one, my total estimate was $21,000.

Q $21,000?

A Right.

Q How did you arrive at that?

A 2800 cubic yards of muck to be excavated. $7.50 per yard.

Q Tell the jury how you arrived at 2800 cubic yards?

A Well, the upper lake is three acres. Excavating three acres at six inches depth, and the lake is three quarters of an acre at six inches depth.

Q In other words, you used an average depth of six inches?

A Yes.

Q Did you reduce the recording of the depths of

these holes to a writing on one of the documents in front of you?

A Yes.

Q Did you prepare the estimate in writing?

A Yes, I did.

Q Did that come from your file?

A Yes, it did.

Q Had you at the time delivered the original of that to Dora Huss?

A Yes, I did.

MR. ORSECK: I would offer Plaintiff's Exhibit 1 for identification into evidence, your Honor.

MR. COLIN: I object to that, your Honor.

THE COURT: On what ground?

MR. COLIN: On the ground it is merely a statement in writing of what he testified to. It has no probative value or evidentiary force of its own.

THE COURT: That objection is overruled.

MR. GRUBBS: May I see it, your Honor, before I object?

THE COURT: By all means.

(Pause.)

MR. GRUBBS: May it please your Honor, I respectfully object on the ground that no proper foundation has been

for those two documents. One of them he said he received from somebody else or made entries on it.

MR. ORSECK: The witness testified he received a map, and all he did was locate on the map the location of the holes.

(Pause.)

THE COURT: Mr. Grubbs, I understand this gentleman to have said he had this map. He and another gentleman were on the floor of the lake. He had the map with him and contemporaneously he marked where the holes were made.

Am I correct?

THE WITNESS: Correct.

MR. GRUBBS: I don't think there is any foundation as to the accuracy of the paper itself that he seeks to put into evidence, its source, by whom --

THE COURT: It was supplied to him by somebody from the New York State Environmental Agency.

Do you still urge your objection?

MR. GRUBBS: Proper foundation, your Honor.

THE COURT: We will have to establish whether this looks fairly and reasonably representative of the shape of the lake that you walked around on the floor, Mr. Rosch.

THE WITNESS: Yes, it does, your Honor.

THE COURT: That objection is overruled.

(Plaintiff's Exhibit 1 received in evidence.)

Q Did you, with the gentleman from Environmental Conservation, also inspect any property in addition to the Doralee property?

A Before the Doralee property begins there is a swamp land in there, and we walked in there. It was quite saturated with water and oil.

Q Did you understand that to be outside of her property?

A Yes.

MR. GRUBBS: I object to what he understood.

THE COURT: Ladies and gentlemen, when I say to "strike something out," and I strike this out, we are all human, and we have heard it, but you are to put such matters out of your mind and not consider it in any way, shape, or form during the trial and in your deliberations.

Q Did you dig with that shovel you were telling us about in the swamp?

A One spot.

Q Did you detect anything when you dug down?

A Oil saturated.

Q How deep?

A About seven inches.

MR. ORSECK: No further questions.

CROSS EXAMINATION

BY MR. COLIN:

Q Mr. Rosch, during what years did you attend Arizona State University?

A '60 and '61.

Q That means you entered in September of 1960, sir?

A Yes.

Q Does that mean you terminated in June of '61?

A Didn't finish either year.

Q What courses did you take there?

A Engineering.

Q What courses?

A Specifically?

Q Yes.

A Math, science.

Q What science, sir?

A Life science.

Q Which life science, sir?

A Animals, Earth Science.

Q What is that?

A Earth Science.

Q What is Earth Science?

A Study of the rocks, geological.

Q What other courses did you take?

A Natural history course, English course.

Q You didn't finish your first semester?

A Right.

Q You call yourself an engineer. Do you hold a degree in engineering?

A No.

Q Do you hold a certificate of any state conferring a degree or status of professional engineer on you?

A No.

Q You say that you went on to the bed of two dry lakes; is that correct?

A The water was out of them, yes.

Q Do you know whether water had ever been in them?

A Yes.

Q How do you know that?

A By the line around the perimeter of the pond.

Q What kind of line?

A If you were to see a drained pond you would see where the water line was.

Q Do you know the means whereby the ponds were drained?

A Why they were drained?

Q The means by which they were drained, how were they drained.

A There was a spillway there and then there is a culvert.

Q Where is the spillway?

A By the road.

Q This is something that could be opened and closed?

A The culvert, yes.

Q And you found it open?

A Yes.

Q And the spillway was lower than the bottom level of either lake; is that correct?

A One level of the lake was higher than the other one.

MR. GRUBBS: I object and ask that the witness answer the question fully.

THE COURT: The answer stands.

Q Was the spillway lower than the level of either lake?

A No.

Q Was it lower than the level of one and not of the other?

A Yes.

Q Which was was it lower than?

A It was lower than the upper one.

Q Was the spillway between the upper lake and the lower lake?

A Yes.

Q Was the drainage as you saw it before you from the upper lake to the lower lake?

A Repeat your question.

Q Was the drainage or flow from the upper lake to the lower lake?

A Yes.

Q Did you observe the means whereby the lower lake was drained?

A No.

Q You didn't perceive any way it could be drained?

A It was drained.

Q But you didn't perceive the way it could be accomplished?

A No.

Q When you say the lakes were drained, you mean they were dry, the surface, the bottom surface was dry?

A Not entirely dry.

Q How dry or how wet?

A There is also a trickle through a lake. There is always a run of water through there.

Q In effect a stream running through?

A A stream or a flow.

Q You dug the holes that you described and you took out some material from the bottom of each of the lakes; is that right?

A Yes.

Q What did you do with that material?

A I inspected it.

Q You looked at it, and after you looked at it what did you do with it?

A After I dug out the hole I put it on the side.

Q After you put it on the side, sir, what did you do with it?

A I left it there.

Q And this was the case with respect to each of the holes and the shovelful of material that you took out; is that right?

A Yes.

Q So there is no question that you did not subject to any kind of chemical examination the earth that you dug up?

A No chemical examination.

Q The purpose of your going to the premises was to make an estimate of how much it would cost to dig out the bottom area of each of those two ponds; is that correct?

A Yes. That's correct.

Q And it would not cost any more or any less to dig it out because of what was on the bottom of the pond; is that correct?

A It makes it a little more difficult.

Q What makes it a little more difficult?

A With the oil in the soil.

Q Let's put it this way: You would dig it out with a bucket?

A There would be two means you could do it. Would you like me to explain?

Q Let me ask the questions. Perhaps it will be a little better.

A Excuse me.

Q You could use some kind of powered machinery to dig it out; is that right?

A Correct.

Q What powered machinery would that be?

A No. 1, a drag line.

Q What is a drag line?

A That's a crane. In this particular case it would have to be a crane on tracks because of the oil in the soil.

Q It would be a caterpillar crane?

A Tracktype crane.

Q And a crane is a device with a derrick-like bottom and the bucket?

A Scoop bucket.

Q What else could have been done? What other machinery could have been used?

A Modern type machine now. If you would like me to explain.

Q Answer my questions.

A Sorry.

Q What other machine could have been used?

A Bulldozer.

Q And a bulldozer is a blade on a caterpillar-type vehicle; is that right?

A That's correct.

Q That pushes the earth from one place to another by means of a blade; is that right?

A That's right.

Q After the earth is pushed away it is gathered up on a truck and carried away; is that correct?

A Yes.

Q It is immaterial to that machinery what is on the bottom surface. It pushes whatever is there; doesn't it?

A To answer your question to that, no.

Q It does not push whatever is there?

A It is not immaterial.

Q Will the bulldozer push whatever it encounters in its path?

A Yes.

Q Will the crane scoop up whatever it encounters where the bucket dips?

A Yes.

Q Wouldn't it be substantially the same cost, in your estimate, regardless of what the nature of the bottom was, assuming that we didn't find rocks and boulders and such, which I assume you did not find, did you; is that correct?

A That's correct.

Q So assuming it was all non-rocky material, it would be substantially the same no matter what was down on the bottom; is that correct?

A Substantially the same.

Q Have you ever been in the oil business?

A No.

Q Have you ever conducted any laboratory tests to detect the presence of oil or petroleum in a material?

A No.

Q Have you ever conducted any laboratory tests to determine the nature of the earth or muck found at the bottom

of a lake bed?

A That's a hard question for me to answer.

Q What is difficult about it? Is the words, "Have you ever conducted," clear to you? Have you ever conducted laboratory tests, is that clear to you?

A What you are saying, have I ever done any of this work in a laboratory, no.

Q You don't hold yourself out to be an expert in determining the physical nature and property of material collected at the bottom of a lake or elsewhere, do you?

A An expert, no.

Q Have you ever seen the bottom of a lake before you saw the bottom of these two lakes?

A Yes, sir.

Q Lake bottoms -- correct me if I am wrong -- are the place to which material settles that is present in the waters of the lake; is that correct?

A Heavy, heavy materials, yes.

Q And oil is a material lighter than water, is it not?

A Yes.

Q Not heavier than water?

A Lighter.

Q So oil does not go to the bottom of the lake,

1 does it? To your knowledge it does not go to the bottom of
2 a lake?
3 A No.
4 Q That's correct, isn't it?
5 A Yes.
6 Q At the bottom of a lake there is rotted and
7 decayed vegetation, isn't there?
8 A Yes.
9 Q That material rots and deposits itself on the
10 bottom, doesn't it?
11 A Yes.
12 MR. COLIN: I have nothing else to ask Mr. Rosch.
13 CROSS EXAMINATION
14 BY MR. GRUBBS:
15 Q Sir, I believe you say you come from Liberty.
16 A Yes, sir.
17 Q Is that the place or city from which the
18 plaintiff's counsel comes?
19 A Yes.
20 Q Have you ever had any contact with him in regard
21 to any legal matter before?
22 A Yes, sir.
23 Q And have you ever served as a witness for him
24 ever or a witness for his client?
25

A No.

Q Have you ever been consulted bv him or his client?

A On any case?

Q Yes.

A Yes.

Q About how many times, would you say?

A A couple of times, three.

Q Were you ever called to court in any case?

A No.

Q When you started your testimony today I believe you were asked about your education and you said you had two years of college; is that correct?

A Not completed but yes.

Q In other words, you really did not have two years of college. You didn't complete either the first or second year.

MR. ORSECK: I object. This was clearly asked and answered.

MR. GRUBBS: Credibility, your Honor.

THE COURT: Overruled.

Q When Mrs. Huss called you, what was the date she called you?

A 19th.

Q Of what?

A September.

Q What year?

A September 19, 1972.

Q At that time did she tell you she had had a lawsuit in connection with these ponds previously?

A No.

Q Did she tell you she was making a complaint?

A Yes.

Q Did you know that you were consulted there in connection with her complaint?

A Yes.

Q Did you know that she was represented at that time by Mr. Orseck?

A No.

Q When did Mr. Orseck first contact you?

A On a subpoena?

Q No. When did he first contact you?

A In July sometime.

Q July of what year?

A '72.

Q When did you make this inspection again?

A July 19, 1972.

Q When you went out there you went out there --

A Excuse me.

THE COURT: It was September.

A It was September.

Q In other words, he contacted you several months before you made --

A I answered the question wrong.

Q What is your answer?

A 9/19/72 I inspected the job site. After that Mr. Orseck contacted me.

Q When?

A Sometime after, in that month.

Q Within the month?

A Yes. After I was there.

Q You went out there to make an estimate; is that correct?

A Yes, sir.

Q You didn't bring any machinery out there with you?

A No.

Q Did you ever do any work on those lakes?

A No, sir.

Q Did you ever do any excavation of any kind?

A No, sir.

Q Did you ever do any work of any kind for the

Doralee Estates?

A No, sir.

Q Did you ever receive any request from them to do any such work?

A No, sir.

Q I believe you said you walked over and looked at some swampland filled with water and oil.

A Yes, sir.

Q Do you know the boundaries of the Doralee Estates property?

A Not precisely.

Q Do you know whether or not some of that marshland, swampy land you described was within the boundary of Doralee's?

A No.

Q I believe you identified -- do you have an exhibit in front of you?

A Yes.

Q I believe you mentioned that there was a culvert through which at least one of the two lakes could be drained; is that correct?

A That's correct.

Q You want to make a circle around that culvert through which the lake had been drained?

THE COURT: This is a contemporaneous exhibit. If you want to make some marks we will do it on another piece of paper. This is an instrument --

MR. ORSECK: I have a copy of that.

THE COURT: Use the copy.

Let's mark that as Exhibit 1-A and we will let him make marks on Exhibit 1-A.

xxx (Plaintiff's Exhibit 1-A marked for identification.)

Q I show you Plaintiff's Exhibit 1-A for identification and I ask you would you circle the culvert through which the lake was drained.

A (The witness complied.)

Q Have you marked it?

A I put a circle here.

Q Put a "C" there for culvert.

A (The witness complied.)

MR. GRUBBS: May I offer this as a third-party defendant exhibit in evidence.

THE COURT: Any objection?

MR. ORSECK: I have no objection.

MR. COLIN: I have no objection.

xxx (Defendant Third-Party Exhibit A received in evidence.)

Q What if any bill did you ever render to Doralee, Inc. for the services you rendered?

A This is the bill (indicating).

Q Did you ever render a bill for going out there?

A No.

Q So in other words Doralee, Inc. has paid you nothing?

A Right.

Q For this service?

A That's right.

MR. GRUBBS: Thank you.

REDIRECT EXAMINATION

BY MR. ORSECK:

Q When you mentioned to the jury that you were an engineer, would you tell the jury what you did from the time you got out of school until the time you went into business.

A Operate heavy equipment.

MR. COLIN: I object to that.

THE COURT: Overruled.

A Operate heavy equipment.

Q Did you belong to a union?

A Yes.

MR. GRUBBS: Objection. That is immaterial.

THE COURT: Overruled.

Q What union did you belong to?

A International Union Operating Engineers, Local 825.

Q Isn't it a fact that in the trade anybody who is a union operator of a bulldozer or crane can call themselves engineers?

MR. COLIN: Objection.

MR. GRUBBS: Objection.

THE COURT: I will sustain the objection to that.

Q What do operators of bulldozers and cranes who are members of unions call themselves in the trade?

MR. COLIN: Objected to.

THE COURT: Overruled. Go ahead.

A Engineers.

Q In that course of work, you of course know what the bulldozers and everything uses for fuel.

A Yes. No. 2 fuel oil or diesel fuel.

Q You know what that is, don't you?

A Yes, sir.

Q You have handled a lot of it in your time?

A A lot of it.

MR. COLIN: Objected to.

THE COURT: Overruled.

Q You know what it is like when it is on the ground?

A Yes, sir.

MR. ORSECK: I have no further questions.

THE COURT: Anything further?

RECROSS EXAMINATION

BY MR. COLIN:

Q Mr. Rosch, have you been promised or have you discussed the matter of compensation for your testimony in this case?

A No, sir.

Q You have had no such discussion with anybody?

A No, sir.

Q Do you expect to be compensated for appearing here and testifying?

A I should be.

Q You expect to be?

A I hope so.

RECROSS EXAMINATION

BY MR. GRUBBS:

Q Attorney Orseck started to question you and you stated you were an engineer. Were you not telling us you were qualified as a scientific public engineer in this case?

A Am I a scientific engineer?

Q Are you a licensed engineer?

THE COURT: No, no.

A No, sir.

Q You are not a licensed engineer?

A Yes.

Q And you knew that when you answered the question?

THE COURT: No, counsel. I sustain an objection to that.

Q When somebody asks you if you are an engineer when you are testifying, does that mean to you that you are an engineer of some machine or are you giving us the idea that you are a qualified engineer?

MR. ORSECK: Argumentative.

THE COURT: Sustained.

Q When you said you were an engineer, did you state that to let the jury know you ran a machine?

A Yes.

Q That was the only purpose of your saying that?

A Sure.

MR. GRUBBS: That's all. Thank you.

MR. ORSECK: That's all.

THE COURT: Thank you very much.

(Witness excused.)

1 T H E O D O R E R. H U D S O N, called as a witness
2 by the plaintiff, having been first duly sworn, testi-
3 fied as follows:
4 DIRECT EXAMINATION
5 BY MR. ORSECK:
xxx 6 Q Where do you live?
7 A Bradley, New York.
8 Q Do you have a family?
9 A Yes.
10 THE COURT: Where is that?
11 THE WITNESS: Next to Neversink. That's up
12 in Sullivan County.
13 Q Do you have a family?
14 A Yes.
15 Q Do you have children?
16 A I have four children and a wife, of course.
17 Q Who is your employer?
18 A New York State Department of Environmental
19 Conservation.
20 Q How long have you been employed by the Depart-
21 ment of Environmental Conservation?
22 A Since January 13, 1972.
23 Q Would you give the jury a little resume of your
24 education and your job experience before you became employed
25

by the Department of Environmental Conservation?

A I was in the Marine Corps for ten years, and I was a nuclear biological and chemical warfare specialist. I was discharged December of 1971 and I was immediately employed by the State as an investigator.

Q What kind of investigator?

A Mainly water pollution at that time.

Q Was any training afforded you with respect to your duties?

A I went to Edgewood Arsenal, Maryland. We handled mostly toxic substances in the service.

Q How about on the job with the State?

A With the State, yes. I went to -- They had several courses in Albany, and I went to Syracuse for sewerage treatment operator's course.

Q During the course of your employment with the New York State Department of Environmental Conservation, did you have a number of occasions to inspect the premises known as Doralee Estates at Monticello, New York?

A Yes, I did.

Q Did you also have occasion to inspect the Cities Service plant across the street?

A Yes, I have.

Q During the year 1972, you have records, do you

not, which indicate at least a minimal number of times where you were present at both Doralee and Cities Service; is that correct?

A Yes, sir.

MR. COLIN: Your Honor, for reasons I have indicated to your Honor I object to the reference to the oil terminal across the street as the Cities Service Oil Terminal. There is no proof in this case establishing that as the fact, and until there is such proof I would ask that it be referred to as the oil terminal, without counsel's identification in the manner he employed.

MR. ORSECK: May I be heard, your Honor?

THE COURT: Can you have this gentleman describe what he regards as the oil terminal, and we will use his description.

MR. ORSECK: May I call --

THE COURT: Overruled.

Proceed.

What was this facility you were talking about, thois oil terminal facility?

THE WITNESS: It was located adjacent to a road; not a highway, a main highway, but a road. They had four large storage tanks above that were suspended on angle irons or something heavier than that, but what we were real-

interested in --

THE COURT: What kind of descriptive names were painted, written on, signs at that time?

THE WITNESS: It was abbreviated. Monticello Gas & Oil, MGO.

THE COURT: This is the facility you are talking about.

Let's go ahead on that basis.

Q Did you see any emblems painted on any of the trucks or tanks in the yard?

MR. COLIN: I object to that.

A Yes, we did. Could I elaborate? We had a hard time pinpointing the owners --

THE COURT: No. Please.

Q Describe the emblems.

A Cities Service, a scallop-like thing.

Q For continuity let's talk about September 19, 1972. Were you present at the site that we are discussing, the Doralee lakes on September 19, 1972?

A Yes.

Q Tell the Court and jury the circumstances under which it came to be that your appearance was on that day?

A We had gotten a report of a fishkill in the lakes of Doralee, so I arrived the same time -- We have a

special biological unit, fisheries --

Q We are not taking these dates chronologically. We are skipping to September 19, 1972.

A I'm sorry.

On September 19, 1972, that is when I met with him at the facility. We had received a complaint, Mr. Rosch.

Q Did you know he was going to be there at the time?

A I didn't. I really don't know if it was a telephone complaint or a written complaint. I was told by my superior to go check it out to see what was going on.

Q Let's talk about Mr. Rosch for a minute. Did you accompany him on a walk through the upper and lower lake?

A Yes.

Q Were you present when he dig the six or seven or eight holes that he discussed earlier?

A Yes, I was.

Q Did you verify the depths that he dug with respect to each of those holes?

MR. COLIN: I object to that.

THE COURT: Sustained in the manner it is put.

What did you see, Mr. Hudson?

THE WITNESS: When I arrived, first, it was supposed to be that an oil truck that was being filled was

supposed to have overflowed.

MR. GRUBBS: Objection and move to strike.

MR. COLIN: Objection.

THE COURT: Strike that. The jury is to disregard that.

You went with him through the lake bottom while he dug some holes?

THE WITNESS: Yes, sir.

THE COURT: What did you see?

THE WITNESS: It was a mucky solution and it was in spots. It was oily and it had a fossil fuel smell to it.

THE COURT: A fossil fuel smell to it?

MR. COLIN: I move to strike.

THE COURT: Objection overruled.

MR. COLIN: There is no proof of this man's qualification.

THE COURT: Denied.

Q At each of the locations where Mr. Rosch dug, did you determine whether oil was present at one, more, or any of them?

MR. GRUBBS: I object to the form of the question.

THE COURT: It is leading.

What did you see?

THE WITNESS: When he dug down into the bottom, the top portion was mucky and as you went down it cleared up, it became much lighter. I would still say there was oil, but as you say I'm not an expert.

MR. GRUBBS: I object and move to strike.

MR. COLIN: I object to that.

THE COURT: I would like to have it read back.

(Record read.)

THE COURT: I will permit it to stand.

Overruled.

Q Did you pick up the material and smell it?

A Yes, sir, I did.

Q Did you run it through your hands?

MR. GRUBBS: Objection. Leading question. This is improper. He didn't ask him what he did; he asked him if he didn't do this.

THE COURT: Overruled.

Go ahead.

A What I did?

THE COURT: Tell us what you did. That's all.

THE WITNESS: I picked it up, ran it through my hands and I smelled it, and to me it smelled like oil. I know it was oil because when I got home my boots were totally saturated and I had to throw them away.

MR. COLIN: I move to strike.

THE COURT: Motion denied.

Q Did you walk in the swamp in addition to the lake beds?

A Yes, sir, I did.

THE COURT: I will strike out the fact that he threw his boots away. The rest may stand, Mr. Colin.

Q In your presence did Mr. Rosch dig in the swamp?

A Once -- He said the swamp was not his job or his problem, so I walked in the swamp.

Q What did you find?

A The oil there -- the vegetation had trapped it and it seemed to me it was an accumulation which was decayed vegetation that was there, but it was also an oily substance that was present.

Q This was not the first time you were in that swamp or about these premises, was it?

A No, sir.

MR. COLIN: That is objected to.

THE COURT: Overruled.

Q Had you personally traced this oily substance in the swamp back to its source?

A Yes.

MR. COLIN: Objection.

A We didn't dig it up but we traced it as far as we could.

MR. COLIN: Was my objection noted, your Honor?

THE COURT: Yes.

Q Would you tell the jury what the source of the oil was as far as you could determine?

A There was adjacent to the oil company a spillway that leads into a culvert which our department had instructed that they put in an oil trap which consisted of a 55-gallon drum, which was never maintained.

MR. COLIN: This is completely unresponsive.

THE COURT: At this point it is not responsive to any question.

How did you trace this spill? How did you trace the oil in the swamp?

Q By route?

A It would go underneath the road.

Q From where? Start from the beginning.

A I was trying to do this.

The oil trap was not maintained. It would flow out of the oil trap, in the culvert, and as Doralee is much lower than the actual oil company, it would trace right through -- We put dye on it and the dye showed up in the swampy area, a fluorescent dye that we use for sewerage.

MR. COLIN: This witness' answer seems to me to be a combination of more than one event. I would like to have it clarified. I don't want to interrupt Mr. Orseck.

THE COURT: I will permit it to stand. You may cross-examine if you wish on this.

Q Just so we have the last answer clear, is my understand correct that at the Cities Service' premises --

THE COURT: No. The oil facility.

Q At the bulk plant facility you dumped a fluorescent dye near the culvert?

A Yes.

MR. COLIN: May we have a time fixed?

THE COURT: Yes, but let's let the man finish the subject matter. You can establish this anywhere along the way.

You put a dye in near the culvert and what happened?

THE WITNESS: It was on a very rainy day, sir, and we put the dye in, and it took the dye approximately five to seven minutes to reach the other side of the road.

Q Is the other side of the road the swamp that we were just talking about?

A Yes, sir.

Q Is it true that the swamp feeds the lake?

A Yes, sir.

THE COURT: When did you do this?

THE WITNESS: The dye? In April of 1972.

Q Exhibit 2 for identification is a document that you have before you, is it not?

A Yes, sir.

Q Does that document refresh your recollection as to the dates that you were present at the bulk plant and at Doralee Estates during the year 1972?

MR. COLIN: Objected to.

A Yes, sir.

THE COURT: On what ground?

MR. COLIN: It has not been shown that the witness lacks a recollection without reference to a document. He is using it to refresh his recollection.

THE COURT: I will sustain that.

Q Do you independently remember the date back in 1972 when you were present at the bulk plant and at Doralee?

A I can remember some of them. I would have to refresh my recollection because we have several other places that were polluting.

Q Without refreshing your recollection, can you tell us what days you were there? If you can't tell us that --

A I know. Can I go back?

THE COURT: I think you have established a foundation for using this memorandum.

Go ahead.

Q Would you refresh your recollection as to what days you conducted inspections.

A The first time I arrived at Doralee was when the fishkill was. That was April of 1972, I believe, or March of 1972.

It was April of 1972, the 13th of April.

Q Were you also there on April 20th?

A Yes, sir, I was.

Q And September 19th?

A Yes, sir.

Q And September 12th, all of 1972?

A Yes, sir.

Q On each of those days would you tell the judge and jury whether or not it is a fact that you determined that the bulk plant was in violation of the pollution laws rules?

MR. COLIN: Objection.

MR. GRUBBS: Objection.

THE COURT: I sustain that.

Q Let's take it from April 13th. What did you see with respect to the bulk plant on that date?

A April 13th?

Q Yes.

A The 13th -- I could not actually say it was the 13th. I could go from the 20th.

Q How about on the 20th?

A That was the date of the fishkill, as far as I know.

Q Tell us what you saw.

A I arrived there that morning about eight-thirty and I met with Conservation Officer Paul Dwyer and Conservation Officer Schlant waiting for our fishkill unit to arrive from Avon.

Q What and where is Avon and what is a fishkill unit?

A Avon is in our region upstate. I don't recall the region, but they have trained biologists and professional engineers that go out on different oil spills and more so if it is involved in a fishkill.

Q What did you see out there that day?

A There was a thin film of some type of residue on the pond, and there were several fish that were in distress, and at the far end of the first pond there is, I guess it would be, a spillway, you would say, and there were several dead fish in that spillway.

Q Did you determine what the film on the lake was

at that time?

A No, I didn't, but the biologist took samples.

Q And those samples were taken in your presence?

A Yes.

Q You were also present on December 12th of that year, were you not?

A Yes.

Q Do you remember what you found there?

A It was snow that was in the pond and the snow was of a dark nature.

Q Did you determine what that was?

A It had an oily residue to it.

MR. COLIN: Objected to and move to strike.

THE COURT: Denied.

Q Did you inspect the ditch on December 12th alongside of the bulk plant?

A I did. The water was not actually running, but it seemed to me that it did have some oil in the culvert.

MR. COLIN: I move to strike.

THE COURT: What do you mean when you say "it seemed to me"?

THE WITNESS: Where it had been seeping in, sir, over a period of time.

THE COURT: This was apparent to your eyes?

THE WITNESS: Yes, sir.

THE COURT: Motion denied.

Q Before or earlier you mentioned that there was an oil trap in the ditch alongside the bulk plant; is that correct?

A Yes, sir.

Q Would you just take a minute, the best you can, to describe that to the jury so they know what you are talking about?

A I had a 55-gallon drum -- this was makeshift. You could actually buy them but you could also make them. The object is that the oil is heavier than water so the oil would stay into the drum because it had a spill pipe.

Q You mean lighter?

A Yes, lighter, and the water would actually go out of the drum and the oil would remain in the drum.

Q What was the purpose of that?

A So they could trap it before it would actually go into the swamp or into the culvert.

Q So we understand it, that was installed by the bulk plant people and its purpose was to keep oil from going into the culvert under the road into the swamp?

A Yes.

Q Did it work?

A To the best of our knowledge it did not.

MR. COLIN: I object to that. There is no basis whatsoever for the answer to that question.

THE COURT: Just a moment.

Q What did you observe about this 55-gallon drum which led you to the conclusion that it didn't work?

THE COURT: And when did you observe it?

THE WITNESS: It was, I would say, April or possibly September of 1972. As a matter of fact, it was a time when I notified my boss for him to come and see --

Q Describe what you saw.

A The oil was not staying in the barrel and it was flowing along the water.

Q Let me try to help you if counsel will permit.

In order for that to function properly or efficiently, what had to be done to it, if anything?

A The oil that was accumulated in it would have to be removed physically.

Q Did you determine whether or not the oil that was accumulated in it was being removed physically?

A Every time we went it was full of oil.

Q Was it overflowing too?

A It was overflowing.

MR. GRUBBS: Leading, your Honor.

THE COURT: Overruled.

Q In April or May of the following year of 1973, do you remember being at the bulk plant?

A Yes, I do.

Q What was the occasion and what did you see?

A There was a complaint that there was an oil spill.

When I arrived they were actually moving the tanks or dismantling the plant.

Q The plant was being dismantled?

A Yes. It was in 1973. It was midsummer of 1973.

The reason I don't have accurate records is because I had been transferred from water pollution to air pollution, and the reason I was called was that I live within that area; so the reason I didn't follow it through was that

#3 I reported it to Mr. Kwak. However, being that they were dismantling we thought that this would be the end of it and it is not a policy if we have a commissioner's order to harass a company -- which we did have a commissioner's order against the company.

Q In other words, while the tanks were being dismantled, taken away, while they were being removed they spilled oil?

MR. COLIN: Objection.

MR. GRUBBS: Objection. He is testifying through his attorney.

THE COURT: Please.

What did you see?

THE WITNESS: I observed that there were large quantities of oil on the ground when the plant was being dismantled.

Q You heard Mr. Colin ask Mr. Rosch the obvious question. Oil is lighter than water and rises to the top; is that correct?

A True.

Q With that in mind, would you tell us, if you can, how the oil got to the bottom of the lake that you testified to earlier?

A Well, I imagine the seepage --

MR. GRUBBS: Objection.

THE COURT: I will sustain that. Either this gentleman has a knowledge of this or he doesn't, counsel.

THE WITNESS: When oil --

MR. COLIN: His Honor has sustained the objection on the basis of the witness's statement that he imagines.

Q The question is this: Do you know?

A When the vegetation decays oil will cling to anything, and the vegetation that is in the swamp is so oil-

saturated that some of it will sink to the bottom in the muck or in the decayed vegetation, or anything that will sink, it will cling to it.

Q And the lake is lower than the swamp?

A Yes, it is.

Q And the pond, the three-quarter-acre pond, is lower than the lake?

A Yes, sir.

MR. ORSECK: That's all.

THE COURT: We will take our mid-afternoon recess at this point, ladies and gentlemen.

(Recess.)

(Continued on next page.)

Doralee v. Cities Service v. MGO 1/3/77, 73 Civ. 907, Judge Owen

1/3

(Jury in box.)

CROSS EXAMINATION

BY MR. COLIN:

Q Mr. Hudson, what was the nature of the discharge you received from the military service?

A Honorable.

Q Did you receive a subpoena to appear here today?

A Yes, sir.

Q Do you have it with you?

A Sure do.

Q May I see it, please?

A (Handing)

(Pause)

Q After you received this subpoena did you communicate with Mr. Orseck or anyone in his office?

A Yes, sir.

Q Did you meet with Mr. Orseck before you testified today?

A Over the phone and I came down by car with him today.

Q Did you have a telephone conversation with him regarding this case and the nature of what it involved?

A Yes, sir, I did.

Q Did you have a similar discussion in the car driving down?

A We talked about it, not in detail. We did talk about it.

MR. ORSECK: Your Honor, at this time, the plaintiff respectfully requests the Court to instruct the jury that counsel has a right, more than that a duty, to interview witnesses prior --

THE COURT: That is not a question, it is a fact. Do you wish me to charge that at the close of the case?

MR. ORSECK: Thank you, your Honor.

Q Mr. Hudson, you had before you when you testified and you have handed me a document of seven pages. I ask you, sir, whether this document came out of the files of the department for which you work?

A Yes, sir, it did.

Q Was this a document that you prepared yourself?

A I had input in it, yes, sir.

Q I will ask you again, sir: Was this a document that you prepared yourself?

A I said I had input. I'm not an engineer. I can't make that document. It has to be made by an engineer.

Q You did not make this document?

A I wrote it and he prepared it.

Q Did you put your signature to it anywhere?

A No, sir.

MR. ORSECK: Your Honor, I would object to further questions unless the document is used for the same purpose that it was used on direct, merely to refresh recollection.

MR. COLIN: This document is marked as an exhibit.

THE COURT: It is not in evidence.

MR. ORSECK: I would offer it in evidence.

Q Mr. Hudson, did you graduate from high school?

A Yes, sir.

Q Which high school?

A I went to Franklin K. Lane in Brooklyn.

Q Did you have schooling after high school?

A Yes, sir, in the service.

Q Let me rephrase my question. Did you attend an institution of higher education such as a college or university?

A On campus, yes, sir. The University of Maryland.

Q What was the nature of your enrollment, if any, at the University of Maryland?

A I have a total of sixteen credits in different subjects.

Q Was that on a non-matriculated basis?

A As a matter of fact I'm enrolled in college now. Six credits, yes.

Q Six credits were non-matriculated or six were matriculated?

A Matriculated.

THE COURT: Somebody tell me what that means.

MR. COLIN: What it means to me, sir, and let's clarify it with the witness.

Q Did you understand when I said non-matriculated that you were not enrolled for a degree?

A True.

Q At the university?

A Yes.

Q And were you attending the university on a non-degree basis?

A Yes, sir. I was.

Q The sixteen credits that you spoke of, if they were credits that would count toward a degree, that represents one semester or half a college year?

A Yes, sir. About a half.

I am presently enrolled in college now.

Q I would ask you answer my questions and wait until you have a question before you speak.

THE COURT: Proceed.

Q You testified that you walked through the swamp area alone withou Mr. Rosch; is that correct?

A He started to accompany me and took one shovelful and then he chickened out.

Q In substance you walked through the stamp area without Mr. Rosch?

A Yes, sir.

Q Were you wearing rubber boots when you went through the swamp area?

A No, sir. $50 denim boots. I had just purchased them.

Q Were they of the waterproof variety?

A They were supposed to have been.

Q They disappointed you?

A They were waterproofed after I walked through the swamp because they were oil soaked.

MR. COLIN: I move to strike the witness' answer. I think, your Honor, we have had a considerable number of evidences of volunteered partisanship by this witness.

THE COURT: I do not want to hear any colloquy in this court. Let me hear the question and the answer.

(Record read.)

THE COURT: I will let the whole thing stand. Go ahead.

Q When did you walk through the swamp, Mr. Hudson?

A You have my paper.

Q You want to look at it in order to refresh your recollection?

A Yes, sir, please.

(Pause)

Q After you find the matter that refreshes your recollection will you point it out to me, sir?

(Pause)

A It was September 19, '73 or '2. It was the 19th of September of 1972.

Q What on that document refreshed your recollection that you walked through the swamp on that date?

A The 12th there was snow present.

Q Point out the item by number.

THE COURT: He is answering.

A The 12th there was snow so I could not have walked on the bottom on the 12th. It had to be September 19, '72.

Q What is there that would rule out April 20 of '72?

A That was when the fishkill was, I believe.

Q You didn't walk through the swamp on April 12?

A I didn't walk through the swamp on April 20.

Q You walked through it once?

A Yes, sir.

Q That was your entire opportunity to observe the conditions in the swamp; is that right? That day?

A Okay. I had observed it before earlier.

Q By walking through it?

A Not through it. We waited on the side -- we didn't have to walk through it. We saw where the dye was coming into the swamp.

Q Let's go to that. What day did you put the dye in?

A That was around April 13.

Q April 13 of 1972. Where was the dye put in?

A Right at the culvert adjacent to the corner of the plant. If Doralee is on the left, the culvert is in the corner, right on the corner.

Q On the other side from Doralee?

A I could draw it if you like, sir.

Q Tell me. Is it on the same side or the other side as Doralee's?

A What do you mean? There is a road in between. There is a road here, the culvert is here, and Doralee is over here.

Q Does Doralee border Cold Spring Road?

A Yes, sir. But you have to go back a ways.

Q Does the bulk plant border that?

A Yes, sir.

Q And aren't they on two different sides of the road?

A Yes, sir.

Q Where did you put in the dye that you speak of?

A Right in front of the bulk fuel place.

Q Into the --

A Culvert.

Q You mean an open ditch?

A Yes, sir.

Q Who put the dye in?

A I did.

Q Then what did you do?

A We walked down the road.

Q When you say "we," who was with you?

A Another fellow, Bernie Lohman.

Q You walked down the road to where?

A Until we -- just before -- Doralee's is off to the left and there is a swampy area.

Q You walked down to there. What if anything did you observe?

A The dye is red in nature when it is in a dry form and once it is wet it has like a fluorescent green color to it so you could easily see it. We use it for sewerage.

Q What did you observe, sir?

A I observed some of the green dye coming out.

Q Of where?

A Well, going into the swampy area.

Q From where?

A It had to come from where we come from. I didn't drip any with me.

Q How long did it take until you made the observation of the dye in the swamp area from the time you say you put it into --

A I would say seven minutes or so. Something like that. I didn't actually time it. We waited for it.

Q Did you then wait to observe what happened to the dye after you saw it come into the swampy area?

A No, I didn't.

Q You didn't trace it beyond the swampy area?

A You would have to put in an awful lot of dye to trace it.

Q I asked you, did you trace it beyond the swampy area?

A No.

Q That was the last you saw of the dye?

A That's right.

Q You don't know where it went thereafter?

A No, sir.

Q When you were in the swampy area did you see vegetation?

A Yes.

Q There was a good deal of vegetation there?

A Yes.

Q That's the nature of the swamp?

A Yes, sir.

Q Did you scoop up anything at the bottom of the swamp?

A I would not say the bottom.

Q Did you scoop up anything from the bottom?

A No, sir.

MR. ORSECK: Your Honor, this is the third or fourth time a question is put to the witness on top of another one while the witness is answering.

THE COURT: He said no. He said he did not scoop up anything from the bottom of the swamp.

Q Have you ever seen swamp bottoms other than this one in the course of your experience?

A Yes, sir.

Q Have you ever seen lake bottoms in the course of your experience other than the Doralee lake bottom?

A Yes, sir.

Q You made reference to fossil fuels before. Do you remember that?

A Yes, sir.

Q Fossil fuels are coal and oil among other things; is that correct?

A Yes, sir.

Q You know, do you not, that coal and oil were formed by decaying vegetation, don't you?

A Yes, sir.

Q You know that, don't you?

A Yes, sir.

Q You know as a matter of fact that there is a fossil fuel called peat which is soil containing a lot of decayed vegetation, right?

A Yes, sir.

Q Have you ever seen peat?

A No, sir. I've heard of it.

Q Peat is burned in many parts of the world, isn't it?

A I imagine so, yes, sir.

Q Did you ever smell coal?

A Yes, sir.

Q How does it smell?

A It has a pungent odor to it.

Q Did you ever smell decaying vegetation?

A Yes, sir. It smells septic, like stagnant water.

Q How does decaying vegetation smell?

A Septic also.

Q What do you mean by that?

A Stagnant. If you let a pool of water sit there without moving and the rotten leaves, grass, or twigs, it would smell like a head of lettuce you let sit and decay.

Q That's material that is freshly decayed?

A Yes.

Q It smells bad?

A It does.

Q It has a strong odor?

A Yes.

Q Have you ever smelled decaying vegetation that has been decayed for a long time?

A Yes, sir.

Q How does that smell?

A It smells septic also but not as strong as a freshly rotten say head of lettuce, but it does have a distinctive odor than fuel, sir.

Q I didn't ask you that question.

A I was trying to bring a parallel.

Q Did you see any vegetation on the Doralee lakes?

A Decayed vegetation?

Q Vegetation on the surface of the lakes.

A Yes, sir.

Q You saw vegetation on the surface of the Doralee lakes?

A Can I say decayed vegetation?

Q Let's talk about live vegetation.

A No, sir.

Q You say you saw decayed vegetation?

A Let's say I saw muck.

Q On the surface of the lake you saw muck?

A On the bottom -- I'm sorry. You are talking when we had water. I was talking about the bottom.

Q Let's get tuned into each other. My question, sir, first, is did you see any live vegetation on the surface of the Doralee lakes?

A Yes, sir. I would say yes, algae.

Q When did you see that?

A The day of the 20th of April, '72.

Q What did you see at that time?

A Really, there was vegetation but our main object at that time --

Q Please answer my question.

A I saw dead fish more than I did vegetation.

MR. COLIN: I move to strike the answer.

THE COURT: I will leave it stand.

Q Let's get back to this question: Did you see live vegetation on the Doralee lakes on April 20?

A I would say I saw some, yes, sir.

Q Describe what you saw, live vegetation.

A It was slightly green in nature so I imagine it was alive.

Q What did it look like? What kind of plant was it if you are able to say?

A I believe it was algae.

Q It was algae?

A I believe it was. I didn't test it.

Q This was in April of the year?

A Yes, sir.

Q Are the lakes open or icebound in that part of the state in April of the year?

A They are not icebound. We generally have a thaw. The thaw has taken place by then.

Q How many times did you see this live algae on the surface of the lake?

A I would have to say the 20th -- if I saw it I didn't pay attention to it.

Q You are not sure you saw it?

A True, really.

Q Did you see any dead vegetation on the surface of the Doralee lakes?

A There was some mucky, if it is coming from the swampy area, yes, I could say at the catch basin there was an accumulation of something that appeared to be dead vegetation and slimy.

Q At the catch basin?

A Yes.

Q Where is that? Is that the connection between the swamp and the first Doralee lake?

A It is the far end I would say.

Q You saw what there, sir?

A It was slimy in nature. When I picked up the dead fish I washed them off and put them in my bag.

Q Did you wash the fish off in the slime?

A No. In the water.

Q You didn't handle the slime, did you?

A Sure I did.

Q You did?

A Yes.

Q What was the quantity of slime that you found at the catch basin?

A It was quite a bit accumulation.

Q What do you mean by quite a bit?

A I didn't measure it but it was quite a bit. I had to move around --

Q It was lying against the stone or wood of the catch basin; is that it?

A That's right.

Q And the rest of the lake was free of it as far as you could see; is that right?

A Yes, sir.

Q Did you tell me, sir, the date when you put in the dye? Was that April 20? Am I correct on that?

A No, sir. It was not April 20. No, sir.

Q What day was that?

A That was prior to April 13, I believe it was.

Q Prior to April 13.

Did you talk to the people at the oil terminal before you put in the dye?

A No, sir. I didn't.

Q On what day did you see the oil separator at the oil terminal?

A It was prior to April 17, around that time, something like that.

Q April 17, 1972, right?

A Yes, sir.

Q You said the oil separator was a 55 gallon drum lying on its side; is that correct? Is that what you said?

A I think it was upright.

Q Are you sure of that?

A On its side.

Q Isn't it a fact, Mr. Hudson, that the oil separator device was two 55 gallon drums lying on their side?

A It was possible.

Q These drums, and correct me if I am wrong, were lying in the bed of the ditch or waterway along the side of the property, right?

A Yes, sir.

Q Are you familiar with the theory on which an oil separator works, Mr. Hudson?

A I am.

Q An oil separator works, and you can correct me if I am wrong --

MR. ORSECK: I would object --

THE COURT: Overruled.

Continue.

Q Correct me if I am wrong in saying this. An oil separator works by admitting at one end water which may or may not contain oil; is that correct?

A Yes, sir.

Q You said before that the physical nature of oil is such that it rises to the surface of water; is that correct?

A Yes, sir.

Q At the lower part of the oil separator is an outlet, a pipe.

A Yes.

Q Out of which the water passes; is that correct?

A Yes, sir.

Q The upper part of the oil separator has an opening that gives access to the top surface where the oil may be present; is that right?

A Yes, sir.

Q And the oil separator can be skimmed off and the oil removed; is that the way it works?

A Yes, sir.

Q So that works by a physical principle that cannot be changed?

A Yes, sir.

Q It works by the principle of oil being lighter than water and being on top, right?

A Yes, sir.

Q What will flow out of the bottom of an oil separator is water provided that the oil is skimmed off the

top; is that right?

A Yes, sir.

Q Unless it is full of oil water is going to flow out the bottom, correct?

A Yes.

Q Have you any factual basis that enables you to say that the oil, if there was any, was not skimmed out of the oil separator?

A No, sir, I don't.

Q When you put the dye into the place in or near the culvert that you have described, that dye was carried by the flow of the water to the swamp, right?

A Yes, sir.

Q That dye would be carried by water if there were water alone present?

A Yes, sir.

Q Or it would be carried by any liquid that flows; is that right?

A Yes, sir.

Q The dye did not of itself indicate the presence of oil, did it?

A No, sir.

Q What is your job title or what was your job title at the time we are talking about?

A I was an engineering technician and I was promoted to senior engineering technician and now I am a principal engineering technician.

Q Technician means that you do certain technical things; is that right?

A The dirty work, yes, sir.

Q At the time that we are talking about between March '72 and September '72, what was your job? Was it your job to take water samples of places that were suspected of pollution? Is that correct?

A That was one and municipal sewerage treatment plants, we inspected those, and we had around 200 hotels that had small sewerage treatment plants and we inspected them adjacent to the Health Department.

Q You took samples out of those plants and brought them back to some scientific people to check?

A Sometimes, yes, sir.

Q You made reference to the Avon office of the department for which you worked.

A Yes.

Q You said in that office they had trained biologists and professional engineers; is that right?

A Yes, sir.

Q Those were people who had the college degrees and

credentials to perform scientific tests on pollution material; is that correct?

A I really would not know if they did.

Q You said that they had trained biologists?

A Yes.

Q When you said they had trained biologists did you mean that they had people who were trained and qualified to perform tests on materials and living species?

A Yes, sir.

MR. ORSECK: I think we are having a witness pass on somebody else's expertise.

THE COURT: I don't know that.

Anyway I will overrule the objection.

Perhaps it would be more appropriate to renew your objection later on.

Proceed.

Q Your answer to that was affirmative?

A Yes, sir.

Q Do you know of a test or tests where a living creature is exposed to a sample of assumed pollution to determine whether life can or cannot exist in the sample? You know that, don't you?

MR. ORSECK: Excuse me. To this witness the questions --

THE COURT: I do not see how this is cross examination of this witness.

MR. COLIN: All right. I will withdraw the question.

Q Do you know Mr. Spodaryk of the Avon office?

A I have heard his name.

Q Do you know what position he held?

A No.

Q You said that on a certain date you went to the Doralee premises and you observed that there were some dead fish there; is that correct?

A Yes, sir.

Q What was that date, sir?

A April 20.

Q 1972?

A Yes, sir.

Q And another date also?

A Yes, sir. I don't know the actual date but it is on the record. The date of the other trial --

Q Let's stay with what you remember. You remember that on April 20, 1972, you went to the Doralee lake and you saw dead fish; is that right?

A Fish in distress.

Q Did you see any dead fish?

A Very few.

Q You are sure you saw any?

A Yes, sir.

Q You are positive you saw some?

A Yes.

Q If you saw any at any other time it was earlier than that date, correct?

A Earlier than that date?

Q Earlier than April 20, 1972.

A I believe it was after.

Q You believe it was after April 20?

A The 20th I observed. The 19th and 20th was when the pollution -- Avon was down there, the 19th and 20th of April, 1972.

Q That's when you observed a few dead fish?

A In distress that day.

Q No dead fish on that day?

A No, sir.

Q Based on what you saw on April 19 and 20 would you say that there were fish living in the Doralee lake prior to that date?

A If I am qualified to answer, all I could attest to is that I did see those fish in distress. I stayed there approximately two hours and then I left.

Q Since you saw fish swimming in the waters in distress on April 19 and 20, do you not conclude that there were fish living in the lake before April 19 and 20?

A Conceivably so.

Q Conceivably or necessarily so?

A Necessarily so.

Q In a case where there occurs a death or the distress of a large number of fish in a lake at a particular time, does that circumstance indicate to you, sir, that a particular event and cause accounts for that circumstance?

MR. ORSECK: Your Honor, I object, and prior to a ruling may we approach the bench for a second.

(At the side bar.)

MR. ORSECK: The reason I came up is this: Unless there is a legitimate purpose on credibility, etc., I represent to the Court that Mr. Colin and I went to Avon and we examined the trained personnel at length and in detail. We have their depositions, all of their reports.

I object on the ground that this witness said that he does not have this education to make this type of judgment. He was there as an investigator to see if there was oil in the water. Unless --

MR. COLIN: He doesn't say that either.

THE COURT: What say you to that? You have gone to the experts?

MR. COLIN: We are going to use the experts, yes, sir.

THE COURT: Why do you get into this testimony with this man where he is speculating about various things?

MR. COLIN: I don't think it is very speculative. If all of a sudden a large quantity of fish are killed, they must have been living there up to that time.

THE COURT: You don't have to ask him that. You ask him, or me, or Phil Golden here, and we would say the same thing.

MR. COLIN: It is a jury trial.

THE COURT: How is it bringing out anything from

from this man that supports this?

MR. COLIN: Knowledge that there must be a particular -- not just causation to kill them in one day all of a sudden.

THE COURT: Ask him if he knows.

MR. ORSECK: We have that from the expert.

THE COURT: Let's get to that.

(Continued on next page.)

(In open court.)

Q Mr. Hudson, my question to you, sir, is when on a particular day it is observed that large quantities of fish are either in distress or dead, is it necessarily due to a single noxious poisonous cause that produced that condition at that time on that day?

MR. ORSECK: Objection. The witness clearly is not qualified.

THE COURT: The witness can answer if he feels he is qualified, otherwise he may so answer.

A What we have been taught is that the reason oil is --

Q I didn't ask you anything about oil.

MR. ORSECK: Object to the question. He pressed it, and now I think we should hear the answer.

THE COURT: Mr. Hudson, do you think you have the qualifications to give that answer?

(Question read.)

THE WITNESS: In all instances or just when I observed it, sir?

Q Let me try to clarify it since you don't seem to understand.

Assume that there exists in a lake a large number of fish, substantial living fish life. Assume that on a

1 particular day in that same lake it is discovered that large
2 numbers of fish are dead or in distress. Isn't it necessarily
3 due to some particular poisonous noxious cause that was
4 then introduced into the lake?
5 A I don't think so, sir.
6 Q How long were you assigned to the investigation
7 of pollution of water, sir?
8 A I was employed January 13, '72.
9 Q Was your original assignment to check polluted
10 waters?
11 A Yes, sir.
12 Q That means polluted by sewerage and polluted by
13 other pollutants; is that right?
14 A Yes, sir.
15 Q Is sewerage a pollutant so far as a lake with
16 fish is concerned?
17 A If it is untreated, yes, sir.
18 Q That's raw sewerage, correct?
19 A Yes.
20 Q This document that you used to refresh your
21 recollection lists five dates of inspection. The first one
22 is March 21, 1972. Do you see it, sir?
23 A Yes, sir.
24 Q Did you make an inspection on that date?
25

A On March 21?

Q Yes.

A All of these inspections I was present.

Q These were all inspections you made?

A Yes.

Q Do you remember where you went and what you did on March 21, 1972?

A We were sent to the oil depot.

MR. ORSECK: Your Honor, I move the answer be stricken. The question was do you remember, which is yes or no.

THE COURT: Overruled.

You went to the oil depot?

THE WITNESS: Yes.

Q What if anything did you do at the oil depot?

A We tried -- we went to see if there was oil being discharged.

Q Would you confine your answer to what you did rather than use the plural which may or may not --

A I went to observe if there was any oil being discharged from the facility.

Q Did you make an observation?

A Yes.

Q What if anything did you observe?

A There was oil or a dark substance around the culvert area of the plant.

Q That was outside the plant, was it not?

A Yes.

Q That was the highway drainage ditch; is that correct?

A Yes.

Q That culvert outside the plant carried everything that came down in the way of liquid flow from up Cold Spring Road, didn't it?

A Yes.

Q If anything was in that water it would be found at the time you looked at it in the vicinity of the oil plant; is that correct?

A I guess so.

Q There was another oil plant up the road, was there not?

A It is in the opposite direction. The Town Barn are you speaking of?

Q I'm talking of Par Gas.

A That's beyond.

Q That's above?

A Yes.

Q So material from that direction would flow down

1 past the MGO oil terminal?

2 MR. ORSECK: I object to the form of the

3 question.

4 THE COURT: Sustained.

5 Q Whatever was in that ditch coming from above the

6 oil terminal would be seen by anybody who was at the oil

7 terminal looking into the ditch, right?

8 A Yes, sir.

9 Q No way of telling looking into the ditch and

10 what is in the ditch where the material came from, is there?

11 A No.

12 Q Is that all you did on March 12?

13 A I observed the ditch, as you said, but also coming

14 out of the plant there was rock, crushed stone or what have

15 you, that was oil saturated.

16 Q The rock was coming out of the plant?

17 A The rock that was up against the slope like,

18 there was stone, that was oil saturated.

19 THE COURT: Riprap alongside of the culvert?

20 THE WITNESS: Yes.

21 Q Did you make any scientific test to determine

22 what that material was?

23 A No, sir, I didn't.

24 Q Did you remove the rock for testing by anybody

25

else?

A No, sir.

Q What else if anything did you observe?

A On what period?

Q On that day, March 21, 1972. Is that the end of that?

A Yes, sir.

Q Did you render a written report as to what you observed?

A Yes, I did.

Q Is this paper your written report?

A This particular paper?

Q Meaning --

A There is other correspondence, sir.

MR. ORSECK: I have it.

Q This does not constitute your report?

A No.

Q Did you render a report for each day that you made an observation?

A Sometimes it was typewritten and sometimes it was written on a piece of correspondence within the file.

Q You filed it in your office somewhere?

A Yes, sir.

Q What if anything did you observe on March 13, 1972,

and tell me where you observed it.

A March 21?

Q April 13, 1972. That's the next date after the first one.

A That was the date that I put the dye in, sir. It was my second visit.

Q Is that the sum total of what you did on that day?

A Yes, sir.

Q The next date you have is April 20, 1972. Tell me, sir, what if anything you did or observed and where this occurred.

MR. ORSECK: Your Honor, this is just repetitious. That was the fishkill. Everybody in the room heard it twenty times. He examined him and cross examined him.

THE COURT: Mr. Colin, do you have a different purpose for going into this today again?

MR. COLIN: I have a purpose to explore the depth of this witness' familiarity or lack of familiarity with the conditions and there are only --

THE COURT: I believe he has already given you --

MR. COLIN: This is cross examination, sir.

THE COURT: There is no need to repeat.

MR. COLIN: I have not touched on these inspections

by the dates indicated on his aide memoir.

THE COURT: But he has already gone into the details of a given date --

MR. COLIN: I would not know what he did unless I draw this out by the date indicated.

THE COURT: We will recess until tomorrow. You may be some time yet I take it?

MR. COLIN: Some time, not a great length of time.

THE COURT: What do you mean by that? Could we finish in the next ten or fifteen minutes?

Mr. Grubbs, do you have any extensive cross examination?

MR. GRUBBS: Very few questions.

BY MR. COLIN:

Q I was inquiring about April 20, 1972 and I had asked you, sir, to tell us what you saw or did and where this occurred.

MR. ORSECK: I object to that question.

THE COURT: Let's find out if this is the same thing.

A That was the morning of the fishkill. Avon was present and that was when I saw the fish in distress, sir, April 20.

Q That's the sum total of your involvement on that

day?

A Yes, sir.

Q Now, the next date on your memorandum is September 19, 1972. I will put the same question to you and ask you for the same answers.

A This was the date I met Mr. Rosch.

Q When you saw the lake beds and you went through the swamp?

A Yes, sir.

Q And what you have testified to previously represents your total involvement on that day?

A Yes, sir.

Q Then your next date is December 12, 1972. Are you able to give me the same information with regard to that date?

A That was snow in the area and the snow was dirty.

Q That is what you observed?

A Yes.

Q Did you scoop up the material that you observed to be dirty and test it in any way?

A Only by sense of feel and smell and that's all.

Q You did not preserve a sample for scientific testing, did you?

A No, sir.

Q That snow could have been soot deposited from a smoky furnace, could it not?

MR. ORSECK: I object.

THE COURT: Overruled.

A Yes, sir, it could have been.

Q And a smoky furnace soot would have oily odor, would it not?

A Yes, sir.

Q On none of these occasions did you make a scientific test or take a sample to be scientifically tested?

A Me personally, no, sir.

MR. COLIN: That is all I have.

MR. ORSECK: In the interest of saving time, if I could ask one question on redirect, then he could conduct a complete cross examination if he would yield.

MR. GRUBBS: This is short, your Honor.

CROSS EXAMINATION

BY MR. GRUBBS:

Q I believe you testified earlier that you became associated with the New York State Department of Environmental Conservation in either December of 1971 or January of 1972; is that correct?

A No, sir. It was, to be precise, January 13, 1972.

Q You came to Doralee's premises I think you said three times in April; is that correct? Three or four times?

A Twice in April. Three times.

Q Did you come because of a request or complaint by Doralee, Inc.?

A Some of them, yes.

Q I believe you mentioned sometime that this took place during the course of a trial, an earlier trial.

A That date is not present. That was in April but that date is not present. We have not used that date. It was the 24th or 25th of April.

Q Isn't it true that when you went there there was litigation going on throughout April, almost starting early in April and right through?

A Yes, sir.

Q And Doralee was engaged in that litigation?

A Yes, sir.

Q You went there in connection with some complaint she made; is that correct?

A Which one are you speaking about?

Q Your April, 1972 visits to Doralee premises.

A We received a complaint. I don't know where the complaint originated but it was from a complaint, yes, sir.

Q When you receive a complaint don't they label

the complainant?

A Not really. Some people don't want us to know who complained.

Q Were you ever contacted by the attorneys for Doralee Estates at any time on or about that time?

A On the date -- when they were in court, John Clark testified and the judge directed John Clark and myself to go to Doralee Estates and the surrounding area to check for sewerage. Then I brought dead fish back with me on that particular time.

Q That was in connection with a lawsuit you were doing this? Wasn't there a litigation there?

MR. ORSECK: I object. It is argumentative.

THE COURT: Let's put the question again.

Q Isn't it true then, getting back to my original question, that during your April visits to the Doralee premises it was in connection one way or another with a claim or litigation involving Doralee?

A On one occasion, yes, sir. I didn't know a Court was going until that day I went.

Q Did an attorney by the name of Mr. Drew or anybody from the firm of Oppenheim & Oppenheim talk with you?

A They talked with John Kwak.

Q And you were present?

A Yes, sir.

Q So that at the time they talked to John Kwak you were present and you heard what the attorney representing Doralee had to say, did you not?

A Yes, sir. I was in the court, yes, sir.

Q So far as the properties of fish maintaining lakes, etc., you don't purport to be an expert in that field, do you?

A No, sir.

Q Does this culvert bring water flow into or out of the swamp area of Doralee?

A Which one?

Q How many culverts are there?

A The culvert brings -- the culvert adjacent to the oil depot --

Q Isn't the oil --

THE COURT: Counsel, let him finish his answer. Go ahead.

A It brings it into the swamp.

Q How far is that from the oil depot?

A It is quite a way.

Q Yet with these lakes drained in September or at the time you got there in September of 1972 -- was this lake or pond or area drained through that same culvert?

A I don't know how it was drained, sir.

REDIRECT EXAMINATION

BY MR. ORSECK:

Q Even in court water does not flow uphill but flows downhill?

A Yes.

Q And the culvert was uphill from the swamp and lake?

A Yes.

Q Were there any chimneys shooting out any soot out there that day?

A No, sir.

MR. COLIN: Objected to.

THE COURT: I think you better lay a foundation.

Q On December 12 did you as you say pick up the black soot?

A Yes, sir.

Q In your best judgment did you make a determination what caused the black?

A Yes, sir.

Q What was it?

A Oil.

Q Mr. Colin asked you about March 21, whether or not there were any records. Counsel have all stipulated that

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2 document No. 3 for identification is authentic, that is a

3 letter from your superior, John Kwak, sanitary engineer to

4 Monticello Gas & Oil & Electric. I ask you to look at that

5 exhibit.

6 A Yes, sir.

7 Q Does that document refresh your recollection as

8 to what you found March 21, 1972?

9 A Yes, sir.

10 Q Now that you have refreshed your recollection,

11 tell the jury slowly, loudly and clearly what you found March

12 21, 1972 out there at the site.

13 A The ground surface was soaked with oil.

14 MR. COLIN: He is reading a document not in

15 evidence.

16 THE COURT: Put the document to one side. Does

17 that bring to mind what the place looked like?

18 THE WITNESS: Yes.

19 THE COURT: Tell us what it looked like.

20 THE WITNESS: The surface -- the entire area of

21 the depot was oil soaked but that's standard for an oil

22 company.

23 Q What else did it refresh your recollection as to?

24 A The oil trap was being completely bypassed at

25 the time.

Q Those are the two 55 gallon drums that Mr. Colin was telling you how they worked?

A Yes.

Q Your refreshed recollection is that they were being bypassed?

A Yes.

Q Tell the jury what that means.

A It was not even going into -- it was flowing over. The traps were not working properly.

Q Where was the oil going to from the bulk plant?

A Into the ditch and eventually into the culvert.

Q And from there?

A To the swamp.

Q What else did that document refresh your recollection as to?

A May I look at it?

THE COURT: Yes.

MR. COLIN: I think this is an incorrect way to use a document not in evidence. The witness is reading the document and he is going to paraphrase it --

THE COURT: If the recollection --

MR. COLIN: He has picked it up a second time after stating his recollection was refreshed.

THE COURT: The jury will appreciate all of the

circumstances.

Proceed.

A In the report the reason that the oil trap was not functioning properly was that the discharge pipe was plugged with snow and debris. That's why it was ineffective.

THE COURT: Do you have an actual memory of that as you sit here today?

THE WITNESS: Yes, sir. And I had it in my other notes.

Q Is your recollection refreshed by that document No. 3 in any other respect?

A No.

MR. ORSECK: Your Honor, I offer in evidence 3 for identification. It is a letter from --

MR. GRUBBS: Objection, your Honor.

THE COURT: Let me see it.

Do you have an objection to this?

MR. COLIN: I have not seen it yet but I'm sure I will have an objection.

THE COURT: In the meantime can we finish with this witness.

MR. ORSECK: I have no further questions.

MR. COLIN: I may have one or two questions, your Honor.

THE COURT: You hold on to that. Put your questions now. I will rule on the exhibit overnight.

RECROSS EXAMINATION

BY MR. COLIN:

Q Mr. Hudson, you looked at a document to refresh your recollection in connection with your last few responses to Mr. Orseck; is that correct?

A Yes, sir.

Q You did not write the document, did you?

A I wrote a portion of it, yes, sir, except for the last paragraph I believe. I wrote what I actually saw.

Q You did not put your signature on this document, did you?

A We were not allowed to sign them, sir.

Q Your name does not appear as a person to whom the document is addressed?

A No, sir.

Q This is a document bearing the signature of a Mr. Kwak?

A Yes, sir.

Q It is from this that you claim to have refreshed your recollection?

A Yes, sir.

Q Soot from a chimney is black because of incomplete

combustion; is that correct?

A Yes.

Q That means that if an oil chimney is smoky, the soot that comes out of it is unburned oil; is that correct?

A Yes, sir.

MR. ORSECK: Did you see any chimneys in the area?

THE WITNESS: No, sir.

Q Mr. Hudson, there are numerous oil burning homes and establishments in the vicinity, aren't there?

A Yes, sir.

MR. COLIN: No further questions.

REREDIRECT EXAMINATION

BY MR. ORSECK:

Q Is it true the black substance was in the ditch only, on the snow in the ditch?

A No.

MR. COLIN: I object to that question. That is as leading as I have heard in many a moon.

Q Was the black substance anyplace else other than the ditch?

MR. COLIN: That is objected to.

THE COURT: That objection is overruled.

A If it was I didn't notice it.

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THE COURT: Counsel, some to the side bar.

(At the side bar.)

THE COURT: Mr. Colin, you will agree that this letter was, in fact, one that was sent to Mr. Grubbs' client, right?

MR. COLIN: I don't make --

MR. ORSECK: We agreed at the time of the deposition when this was marked, when all the documents were marked, they were all authentic and all purported to be what they were, and anything purported to be mailed, was mailed.

MR. COLIN: It is a general letter. I have stipulated to that but the contents can't be proven through the document.

THE COURT: The problem I have here is that you have attacked this gentleman's refreshment of his recollection on the theory that this document is in some way no basis for that recollection being refreshed.

MR. COLIN: I asked him whether he signed it, whether he is the addressee of it, and he said he wrote part of it. He had made a record on that. I think it would be highly detrimental if this document were admitted into evidence. You would have facts stated and claimed here which are not susceptible to cross-examination. I think it would be --

MR. ORSECK: With that, your Honor, I would respectfully withdraw timewise. I withdraw this, the reason

being that the author in his deposition gave us this, and he gave plenty of explanation. If there is any hesitancy I will make the offer at the time read his deposition.

MR. COLIN: Then you are withdrawing it now?

MR. ORSECK: Not now but --

MR. GRUBBS: I will object to it.

THE COURT: Mr. Hudson is the author of the first paragraph?

MR. ORSECK: Yes.

THE COURT: Have you established that on this record he wrote paragraph one?

MR. ORSECK: He said he wrote everything but the last paragraph.

(Continued on next page.)

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(In open court.)

RERECROSS EXAMINATION

BY MR. COLIN:

Q Mr. Hudson, the letter that you used to refresh your recollection, that is the one I have before me now and I am going to ask you some questions.

You made an inspection of the Monticello Gas & Oil Company premises on March 21, 1972: is that correct?

A That's in the letter. The 21st? Yes, sir.

Q Were you alone or were you with someone?

A I was alone on that occasion.

Q Did you see anyone involved with the management or operation of the premises and talk to them on that date?

A No, I didn't.

Q What if anything did you observe about the ground surface of the premises?

A It was oil soaked.

Q Was that a rainy or a dry day, sir?

A That particular day it was dry.

Q Was there any snow or ice accumulation on the surface of the ground?

A There may have been. I really don't recall that.

Q Did you dig up any part of the ground surface?

A Not dig. The rocks were there, stones.

Q You didn't dig up any part of the ground surface?

A No.

Q You therefore are not able to say the extent to which oil may have penetrated the ground, are you?

A No, sir.

Q In fact you don't know whether the oil did or did not penetrate the ground?

A I sure don't.

Q Where did you see the oil on the surface?

A Where did I see it?

Q Where on the premises did you see it?

A Around the tankers.

Q You mean the overhead storage tank?

A They have a wire fence that was surrounding the premises, the grassy area, but it had rocks right there so the water could run down. It would actually seep into the water so the water would not wash the dirt away.

Q I didn't understand you. You saw oil around the overhead oil tanks; is that right?

A Yes. On the surface.

Q Is that below the tanks?

A Yes.

Q How big an area?

A Quite large, sir. I didn't measure it.

Q Can you say how big? 25? 50? Can you estimate the dimensions of the area under the tanks?

A 50 or 60 feet, I would say.

Q The open area of the plant was much greater than 50, 60 feet under the tanks?

A Yes.

Q Many times greater; is that right?

A Yes.

Q You did not see any oil in that open area, did you?

A Yes, sir. It was because of trucks, it is mud and stuff. I don't know if it was oil. It was a mucky substance.

Q So the only thing you believe was oil was under the tanks; is that right?

A Yes, sir.

Q And that you did not dig up?

A No, sir.

Q You refer to surface drains. What do you mean when you say surface drains?

A That's where the rocks are piled up and the culvert is sub-surface.

Q Is the piled up rock what you mean by the surface drain?

A The whole place was sloped towards that culvert pipe, you know.

Q I think I understand. I will try to clarify it.

THE COURT: You are going to be sometime here?

MR. COLIN: I think I will.

THE COURT: Despite the earlier statement you made we will recess at this time until 10 o'clock tomorrow.

(Recess)

(Off the record discussion at the bench.)

(Time noted: 5:10 p.m.)

(Adjourned to January 4, 1977 at 10:00 a.m.)

DORALEE ESTATES, INC.,
vs.
CITIES SERVICE OIL CO., 73Civ. 907
vs.
MGO CORPORATION

January 4, 1977
10:00 a.m.

(Jury in box.)

THE COURT: Good morning.

T H E O D O R E R . H U D S O N , resumed.

RERECROSS EXAMINATION

BY MR. COLIN:

Q Mr. Hudson, we were talking last night when we discontinued about the surface drains. Do you remember that?

A Yes, sir.

Q Correct me if I am wrong, but the surface drains were concrete troughs or gutters that ran around the boundary of the oil plant; is that correct?

A Where the storage drums were, sir?

Q You went to the premises and you observed the premises, right?

A Yes.

Q Did you observe that along the boundary of the property there was a concrete gutter or semicircular trough that ran the length of the boundary?

A Yes, sir.

Q That is what you mean when you refer to the surface drain; is that correct?

A Yes.

Q You talked about the surface drain, and my question to you sir is: If this was sort of a scooped out concrete gutter, in what way was it plugged?

A Well, it was all caked with ice, mud, and snow along with oil.

Q Do you know when the snow was deposited in the gutter?

A It snowed quite a bit that winter.

Q So if it snows the snow would fall everywhere, would it not?

A Yes, sir.

Q It would fall in the gutter and on the ground around it and everywhere else?

A Yes, sir.

Q And in March there is a good deal of snow up in that part of the country?

A Yes.

Q You say the oil traps were being bypassed. By the oil trap we mean the oil separator that we were talking about; is that what you meant by the word "oil trap?"

A Yes, sir.

Q The separator?

A Yes, sir.

THE COURT: Those are the 55 gallon drums we are talking about.

Q Is that what you meant when you said oil traps?

A Yes.

Q Were those traps being bypassed by any arrangement thatwas made to affirmatively shortcut the flow through them?

A No, sir.

Q An oil separator works by the law of physics. The oil is on top and the water is below; is that right?

A Yes, sir.

Q How did you observe it being bypassed?

A It was flowing. It was raining -- so much flow that it was going right over the top of the actual drums. All the water was not going in the drums. They were going over the top of the drums.

Q Where was the water coming from before it went into the separator?

A There was quite a bit of water and other debris coming from these rocks. I don't know if there was a broken pipe or what but there was quite a bit coming out.

Q And the water flowed through what? The ditch or

through the surface drain before it reached the separator?

A I don't follow.

Q By what means did the water come and enter the oil separator?

A What it did, it came from the surface also. Everything was supposed to go through the oil separator for the roof drain, sir.

Q Where was the oil separator placed, sir?

A It was placed, the highway's here and then there is a ditch, a culvert like, and the oil separators were back into the property.

Q What fed into the oil separator? What directed a flow of liquid into the oil separator?

A Any water that was in the plant would go through -- in that direction.

Q By reason of the oil drains that were there?

A Yes.

Q What did you observe that you just described a moment ago?

A That the water was bypassing or going over. It would not actually go down and supposed to settle and then go out.

Q There was too much water for the separator to handle it?

A Yes.

Q Was that because of a weather condition that existed at that time?

A There was occasion that there was rain so hard that it had to go someplace.

Q Did you see that?

A Yes, sir, I did.

Q You saw that on March 21?

A I believe it was March 21, sir.

Q March 21 --

A It was April.

Q We are talking now, Mr. Hudson, about a letter relating to an inspection of March 21. So I would ask you to confine your response --

THE COURT: You asked him when he observed that. That was your question.

MR. COLIN: I am now trying to confine him to March 21.

THE COURT: Let's not confuse him with this. You had asked him when he observed this fact.

Q On March 21 was there a heavy rain, sir?

A No, sir.

Q And you did not observe this overflow on March 21?

A It was an overflow but not as much as another

period.

Q Let's not talk about another date.

MR. ORSECK: That is argumentative.

THE COURT: I sustain that objection.

Q There was a ditch along the roadside that carried the waters down towards the swamp; is that correct?

A Yes, sir.

Q That ditch received the drainage from the road itself, did it not?

A Yes, sir.

Q The road itself along its entire length had oil on it, did it not?

A I didn't observe any oil on the road, sir.

Q Let me ask you this: When there is a skin or film of oil on the surface there is an iridescence, a rainbow-like appearance. Have you ever observed that?

A Yes.

Q Have you observed that many times on public highways and on driveways?

A I have, yes, sir.

Q Is that indicative of oil on the driveway and the highway?

A Yes, sir.

Q And that oil is deposited by the exhaust of

automobiles that traverse the highway?

A Yes.

Q And occasionally there are leaks of oil from automobiles on the highways?

A Yes.

Q That is all on the highway, correct?

A Yes.

Q When it is washed down by rain or flow into the ditch, that oil will be in the ditch, won't it?

A Yes, sir.

Q That was the ditch that passed in front of the oil terminal; is that correct?

A Yes, sir.

Q I have only one further question to ask you, sir.

This letter that has been marked as an exhibit in this case; is that correct?

A That's right

Q This letter that has been marked as an exhibit in this case is addressed to Monticello Gas & Oil Company; is that correct?

A That's right.

Q It is not addressed to Cities Service Oil Company, is it?

A No, sir.

MR. COLIN: I have nothing else.

BY MR. GRUBBS:

Q The trial was adjourned last night. Did you have occasion to speak to plaintiff's counsel?

A For a few minutes, yes, sir.

Q Did you discuss the testimony elicited yesterday?

A No, sir. Not really.

Q Did you discuss the case at all?

A No, sir.

Q Did you ride with him this morning again?

A No, sir.

Q With whom did you come today?

A I met a fellow in Wurtsboro.

Q What is his name?

A I don't know his name.

Q Was he in court yesterday?

A Yes, sir.

Q Could you point him out to us here?

A The gentleman in the brown suit, sir.

MR. GRUBBS: Would you identify yourself.

MR. INGBER: My name is Leo Ingber.

Q Did you and Mr. Ingber talk about the case?

A Only the fact that I hoped I would not be on the stand too much longer.

Q Did he identify himself as having any connection with Doralee, Inc.?

A I have seen him in the Monticello area, but I don't know what his extent is with the company, sir.

Q When you went to Doralee Estates the various times you told us, didn't you see him on any of those occasions?

A I saw Mrs. Huss.

Q Did you ever see Mr. Ingber there?

A I didn't recognize him when I saw him the other day, no, sir.

Q You never talked about any of the visits you made there?

A When is that?

Q Yesterday or any other time.

A Not yesterday.

Q Did you do it on any other occasions?

A No, sir.

Q The letter you used to refresh your recollection is above Mr. Kwak's name, typed name?

A Yes, sir.

Q I believe you mentioned that you and he were together in the courthouse in connection with this prior suit?

A Yes.

Q Isn't it true that your three visits to Doralee in April of 1972 were made during that trial?

A Yes.

Q Isn't it true that at that time you and Mr. Kwak were asked to look at the swamp area at Doralee?

A Yes, sir. I imagine so.

Q Did you go with Mr. Kwak and do that during April of 1972?

A Yes, sir.

Q At that time did you and Mr. Kwak observe several open sewers from the Doralee premises emptying into the swamps?

A I don't believe it was from Doralee. It was adjacent.

Q First of all, did you see several sewers, open sewers, emptying into the swamp land?

A It was not open.

THE COURT: I'm going to give you a little bit of latitude, but this examination, frankly, is recross, and is only occasioned by this letter to the extent it was admitted in evidence halfway down the first page. That is all this examination was allowed for. I'll give you some latitude, but I don't expect to have a complete new cross of this

Q Didn't you use this letter to refresh your recollection as to what you observed?

A Yes.

THE COURT: In March.

Q Do you recall what you observed in April insofar as seeing any sewers emptying into the swampland?

MR. ORSECK: This is now April.

THE COURT: This is April. I'll let you get into this briefly, but this was something that should have been covered in crossexamination yesterday.

Proceed.

A They were private homes and their sewers were not functioning properly. That means that their septic tank was overflowing and their leaching fields were also overflowing, so there was an oozing of some sewerage out of some private homes.

Q Did they feed the swamp in the Doralee Estates?

A I would say it would eventually go to the swamps.

Q There were several of those, were there not?

A I think there were three.

MR. GRUBBS: Thank you.

FURTHER REDIRECT EXAMINATION

BY MR. ORSECK:

Q Were those three sewers what we call "small home septic tanks"?

A They didn't even come out under our department.

Q Eventually, as far as you know, were the repairs made so that it didn't happen again?

MR. COLIN: Objection.

MR. GRUBBS: Objection.

MR. ORSECK: If he knows, your Honor.

MR. GRUBBS: The form is improper. It is leading and suggestive.

THE COURT: Let's find out first if he knows. Objection overruled.

A Yes, sir. We turned it over to the Health Department because it was less than 1,000 gallons a day.

THE COURT: Do you know whether repairs were made?

THE WITNESS: Yes, sir.

Q Were they made?

A Yes, sir.

MR. ORSECK: Your Honor, may I read to the jury the seven numbered sentences?

I am reading from a letter which was admitted

into evidence sent by the New York State Department of Conservation to Monticello Gas & Oil on April 13th.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 3 in evidence.)

Q What I just read to the jury, those were your words and your report?

A Yes, sir.

Q They were made at the time of your observation?

A Yes, sir.

Q And it was typed later and sent to Monticello Gas & Oil by Mr. Kwak?

A Yes, sir.

MR. GRUBBS: There is no evidence that he had such knowledge.

MR. ORSECK: We have a concession from counsel that the letter was received by them in the ordinary course.

MR. GRUBBS: I object to counsel's unsolicited remarks. He is asking the witness a question that there is no basis --

THE COURT: The witness may not know, but I gather from a side bar that it was acknowledged that this letter had been sent and received. That was said to me yesterday.

Isn't that so?

MR. GRUBBS: I didn't know there was any testimony elicited from this witness --

THE COURT: I agree with you in this regard, but I don't think there is any harm done since counsel has acknowledged the letter was sent and received.

Is there anything further?

Q Would you tell the Judge and the ladies and gentlemen of this jury who called you to court in the earlier case in the Supreme Court of Sullivan County back in April of 1972?

MR. COLIN: I object to that.

THE COURT: Overruled.

A It was Monticello Gas & Oil Company.

Q And that is Mr. Grubbs' client who called you?

MR. GRUBBS: Objection.

THE COURT: I sustain that.

MR. ORSECK: I have no further questions.

THE COURT: Is there anything further?

(Continued on next page.)

BY MR. GRUBBS:

Q I believe you said these septic tanks that were draining into the swamp of Doralee, Inc. were not within your jurisdiction; is that correct?

A No, sir. They were not.

Q So was it part of your job to check to see if they were ever repaired?

A Not officially, but I know the individual that was responsible for it, sir.

Q Did you serve a violation on that individual?

A Repeat that.

Q When were these septic tanks or sewers that were draining into the swampland of Doralee, INc. repaired?

A That was about six months after they were notified.

Q When were they notified?

A On the 20th of April.

Q What year?

A 1972.

Q So that would be six months after that that they were repaired?

A Yes, sir.

MR. GRUBBS: Thank vou.

THE COURT: Thank you. You are excused.

THE COURT: Incidentally, Mr. Colin, did you give this gentleman back his subpoena?

MR. COLIN: Yes, sir. I did yesterday.

MR. ORSECK: Your Honor, at this time, so we can get some continuity, I would like to read some depositions.

I have here a copy for the Court.

At this time the plaintiff will read deposition of Leroy C. Langbein.

Your Honor, during the opening I was directed by the Court not to explain what a deposition is.

THE COURT: I will do that at this time.

This is of a witness or of a party?

MR. ORSECK: He is in management of Cities Service.

THE COURT: This is a deposition of Cities Service by Mr. Langbein.

MR. COLIN: Mr. Langbein is an employee, your Honor.

THE COURT: This is the deposition of Cities Service by him; is that correct?

MR. ORSECK: That's correct.

MR. COLIN: Your Honor, it is prefaced as the deposition of Leroy C. Langbein and not of Cities Service by

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Langbein. This was not taken by me; it was taken by the other side.

MR. ORSECK: I state, your Honor, as a matter of record, that Mr. Colin produced Mr. Langbein. I never heard of him. He was produced pursuant to my notice to examine Cities Service.

THE COURT: Is that so?

MR. COLIN: I don't have any recollection, but I could very well have done that as a matter of cooperation.

MR. ORSECK: Your Honor --

THE COURT: Please, counsel.

Would you come to the side bar.

(At the side bar.)

THE COURT: Mr. Colin, I am trying to determine -- and I would like to get a direct answer from you -- whether this is a deposition of your client.

MR. COLIN: I don't know, your Honor.

THE COURT: Why don't you know?

MR. COLIN: This was notified by the other side.

THE COURT: Do you have your office file?

MR. COLIN: Give me an opportunity.

THE COURT: Would your colleague bring your office file to the bench.

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MR. COLIN: I don't know whether it was even noticed.

MR. ORSECK: I don't want to get into any acrimony --

THE COURT: No, no.

MR. COLIN: I might have been asked by counsel whether I could produce somebody. I don't recall this. It was several years ago. I know we had a cooperative proceeding. I might have done this. I don't know.

THE COURT: Do you have your copy of the notice, Mr. Orseck?

MR. ORSECK: I will have to look, your Honor.

(Pause.)

THE COURT: The notice of deposition, the first page of the typed deposition which was taken by the reporting firm of Paul Fromm indicates that the deposition was pursuant to notice.

MR. ORSECK: Here it is right here (indicating).

THE COURT: Did you participate in this deposition?

MR. ORSECK: It was at his office.

THE COURT: Did you produce this man?

MR. COLIN: I produced him, yes, sir.

THE COURT: You are aware in reading through

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here it says that the witness knows of nobody in the Cities Service organization who has more knowledge of the facts involved than he does? I assume you produced him.

MR. COLIN: I produced him because I believed him to be knowledgeable.

THE COURT: Absent anything to the contrary, it is your belief and understanding here that this was a production pursuant to a notice to examine Cities Service Oil Company?

MR. COLIN: I don't know whether there was a notice.

THE COURT: It says so on the face of the deposition.

MR. COLIN: It may say so, but I don't find that in my own file. Maybe it was a voluntary production of the witness.

THE COURT: In any event, this witness was produced as a representative of Cities Service Oil Company by you.

MR. COLIN: I don't think the capacity of the witness was at any time considered, and I know it was not discussed between me and anybody on the other side.

THE COURT: In any event, on this record and on these questions and answers in this deposition, the nature

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of the files you produced at that time, I am going to deem this deposition the deposition of the party.

Mr. Langbein is a witness appearing here on behalf of Cities Service.

MR. COLIN: I would say for the record that I intend to have Mr. Langbein here in person at a later stage in the trial.

(In open court.)

THE COURT: Ladies and gentlemen, there is under the federal rules a group of provisions whereby the parties can obtain information from each other prior to trial. One of those provides for the taking of testimony from the other wide, and in this case, as it appears from the face of this deposition, the questions and answers are taken of somebody, the witness is under oath, and it is taken prior to trial; frequently, but not always, it is taken in one or the other of the offices of the lawyers, and it is to be treated by you just exactly the same as if the witness were sitting here on the stand and these questions were being put to him or her at this very time. So what happens is that a notice is served by one lawyer on the other to have a witness examined on behalf of one of the parties. This is done so that "proper discovery," as we call it, can be done.

In this case a notice was served upon the

Cities Service Oil Company and Mr. Colin produced a witness on behalf of Cities Service Oil Company. His name was Mr. Leroy C. Langbein, and he was produced in Mr. Colin's office at 70 Pine Street on the 23rd of May, 1974. All the lawyers were present. Mr. Grubbs' firm was present, Mr. Colin was present, Mr. Orseck was present and he did some inquiring.

Mr. Langbein was under oath at that time and apparently selected questions are going to be read from here. Mr. Orseck may read as much as he feels is relevant, and Mr. Colin, or any other person, may read such as they feel are relevant.

As I say, you are to treat this exactly as if the witness were on the stand at this time testifying before you.

You may proceed.

MR. COLIN: May I note for the record my exception to your ruling at the side bar conference.

THE COURT: I am not sure what you are excepting to.

MR. COLIN: Does your Honor want me to express --

THE COURT: If you are referring to the ruling that I have made, this was pursuant to notice which I conclude from the face of the deposition; I take that from the face of the deposition. You have acknowledge to me you produced this

witness for examination. You produced Mr. Langbein. You told me that.

MR. COLIN: My exception is to the ruling that this is the deposition of Cities Service Oil Company by Mr. Langbein.

THE COURT: I understand.

You may proceed, but before you do that, come to the side bar.

(At the side bar.)

THE COURT: Mr. Colin, do you intend to disavow this man as a representative of Cities Service Oil Company?

MR. COLIN: No, I don't.

THE COURT: Why do you take that position with me?

MR. COLIN: Because --

THE COURT: I want to be realistic. I am not here to fence with you. I am not here tc do you an injustice, but when you say to me that this is not a representative of the party, if you are right I will go along with you; but I want to know why it is that you are urging this upon me. If you have a good reason for it I will consider it, but if you do not have a good reason for it I want to get that squared away.

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MR. COLIN: May I say this, your Honor: I was employed for twenty-four years by Cities Service Oil Company as house counsel. I know Langbein. I know his status in the organization. He is not an executive of the company; he is not even middle management. He is a field employee and, therefore, my position, very simply, is that he is not one who binds Cities Service by his position in the organization. I know this of my own knowledge. Before I went into private practice I spent most of my life with that company, and I know that very well. My position, very simply, is that I cannot conscientiously, in my own mind, accept him as an executive of the company who would bind the company in that capacity. That's my position, very simply. I am not fencing.

THE COURT: He has been a field engineer and was a manager of construction and maintenance.

MR. COLIN: For a small unit of the company.

THE COURT: He is a manager.

MR. COLIN: That's my position. I don't try cases by --

THE COURT: I know that.

Did you cause to be collected and assembled all of these various exhibits that I see here?

MR. COLIN: I don't know what your Honor has

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before him.

THE COURT: These are the exhibits that were entered during the deposition.

MR. COLIN: I facilitated the documents during the deposition.

THE COURT: Are you going to take the position that this man is not speaking for your company? Are you going to impeach him or discredit him?

MR. COLIN: No, sir. The only position I am taking is that I don't believe that this was noticed as the deposition of the company by Langbein.

THE COURT: Do you know of any specific notice that was served upon Langbein or anybody else as a witness?

MR. COLIN: I don't find any notice to him as a witness.

MR. ORSECK: Your Honor, I never heard his name. I went to his office to examine --

THE COURT: I want to be sure.

MR. COLIN: There are no tricks here.

THE COURT: I am not clear as to why the air is being cleared because it does not seem to me there is any necessity of clearing the air unless there is a reservation by you about some legal point I am not being made aware of.

MR. COLIN: The only point I make -- and maybe

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it is not an important point -- is that this was noticed as a deposition by the company by him. I do not think his position would have warranted that. But otherwise --

MR. ORSECK: That's tricky.

THE COURT: Let's go forward.

MR. COLIN: I'm not going to impeach this witness' testimony.

THE COURT: Let's go forward.

(In open court.)

MR. ORSECK: Your Honor, I am about to read the deposition to the jury of Leroy C. Langbein of the Cities Service Oil Company.

This examination took place in Mr. Colin's office. The dateof the examination was May 23, 1974.

The questions are by me and the answers are by Mr. Langbein.

"Q What is your name?

"A Leroy C. Langbein.

"Q Where do you live?

"A 70 Oakleaf Drive, Marshfield, Massachusetts.

"Q Mr. Langbein, what is your employment, please?

"A I am a field engineer for Cities Service Oil Company.

"Q How long have you been so employed?

"A About three and a half years right now.

"Q What did you do prior to that time?

"A I was a manager of construction and maintenance for the old New York region.

"Q For Cities Service?

"A For Cities Service.

"Q How long have you been with Cities Service altogether?

"A Forty-two years.

"Q As far as your employment as a field engineer is concerned, would you tell us what technical qualifications you have or have attained?

"A Experience in the business.

"Q You are not a licensed engineer?

"A I am not a licensed engineer.

"Q You know that you are here to testify on behalf of Cities Service in an action pending in the United States District Court entitled Doralee against Cities Service; is that correct?

"A Yes, I do.

"Q Prior to this moment, which is ten minutes to eleven on May 23, 1974, in preparation for this examination, did you look at any records,

papers, documents of any kind, nature or description?

"A My own records since January 1973, which are my own records.

"Q Do you have those records with you?

"A I have records with me.

"Q Do you have the records which you just told us you reviewed with you?

"A Yes, I do.

"Q May I see them?

"A (Handing documents to Mr. Orseck.)"

MR. ORSECK: I skip a paragraph to the sixth line on page 6:

"MR. ORSECK: I now request a fifteen-minute adjournment to review the papers, and then I will let you know whether or not I have any questions to ask of the witness.

"(At this point a recess was taken.)

"Q Would you tell us who Russell Smith is?

"A He is in our legal department in Oklahoma.

"Q Do you know Robert G. Beck?

"A Yes, I do.

"Q Where is he?

"A Tulsa, Oklahoma.

"Q Do you have any personal knowledge as to whether or not Mr. Beck has familiarity with the subject of this litigation?

"A Yes, I do.

"Q Does he?

"A He does.

"Q Can you think of anyone in the Cities Service organization, or rather, do you know of anyone in the Cities Service organization who has more knowledge of the facts involved in this action?

"A No, I do not.

"Q Are you in communication with Mr. Beck?

"A No.

"Q Do you know where to get in touch with him?

"A Yes.

"Q Would you tell me where?

"A Cities Service Oil Company, Tulsa, Oklahoma."

MR. ORSECK: At that time, or shortly after, Mr. Colin took from Mr. Langbein's file at my request certain documents, and I am now reading from page 18, number one, where Mr. Colin says:

"This will be Plaintiff's Exhibit 1" --

THE COURT: That is page 10. There is a strikeover on the sheet.

MR. ORSECK: I'm sorry. That should be corrected. I am on line 6.

"This will be Plaintiff's Exhibit 1: Memorandum from L. C. Langbein to R. G. Beck dated 4/8/73."

THE COURT: Perhaps in the interest of time you going to offer these various exhibits?

MR. ORSECK: Yes, sir.

THE COURT: Offer them at this point and see what position is taken.

MR. ORSECK: I offer the seventeen documents which were marked during the deposition of Mr. Langbein.

THE COURT: Could we give them --

MR. COLIN: Let me see what you are offering, please.

THE COURT: Give exhibit numbers to these documents and we will offer them as plaintiff exhibits.

MR. ORSECK: Give them separate numbers for identification.

MR. COLIN: Are these going to be offered individually.

THE COURT: Mr. Orseck has asked that they be given separate numbers.

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MR. ORSECK: I would offer them all at once, to save time.

THE COURT: But you wish to read from them separately and you want to make a separate report as to them, so we will give them separate numbers. You can offer them all at once.

MR. COLIN: May I have a few minutes to look at what is being offered?

THE COURT: You may.

(Pause.)

(Plaintiff's Exhibits 4 through 20 marked for identification.)

xxx

MR. COLIN: These are the deposition exhibits?

THE COURT: They came from the files of Cities Service.

MR. COLIN: I have objections, your Honor. I have not completedreading all of them. If I may, I would like to finish reading them.

THE COURT: Go ahead.

MR. ORSECK: Your Honor, I think I am duty-bound to relate to the jury that Mr. Colin himself produced and identified each of the documents.

THE COURT: I don't think there is any dispute.

MR. COLIN: There is no question about it. I

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produced hundreds of documents on these depositions voluntarily. There is no question about it.

(Pause.)

THE COURT: Ladies and gentlemen, I think I will excuse you. There is no point in your sitting here. We will recall you in a few minutes.

(Jury excused.)

THE COURT: What about Exhibit 4? Exhibit 4 is marked as Plaintiff's Exhibit 1, and it is a memorandum of April 8, 1973 signed by Mr. Langbein. What about that?

MR. COLIN: On this, your Honor, I object to its being marked in evidence. First I object on the ground that it is prior in time to the date of the release delivered by the plaintiff to Cities Service Oil Company; second, that in so far as Cities Service Company is concerned, it contains nothing that would be in any way probative of liability in this action.

THE COURT: The release is dated April 25, 1972.

MR. COLIN: April 25, 1972.

THE COURT: This is a year later.

MR. ORSECK: No, your Honor. This is a year after the release --

THE COURT: I understand.

MR. COLIN: I slipped on the date. I'm sorry,

your Honor. I was under a misapprehension as to the date. Then the ground of my objection, your Honor, is that this document relates to events subsequent in time to the institution of this action and, therefore, immaterial; secondly, it contains nothing which is in any way indicative of liability on the part of Cities Service Oil.

MR. ORSECK: Does your Honor wish to hear me?

THE COURT: Let me ask this: The exhibit is clearly admissible for a number of reasons, but I am troubled by the matters of the fine that was imposed. It does not seem to me that that --

MR. ORSECK: As a matter of fact, in my memorandum to the Court, when I unnecessarily moved to increase the addendum clause on punitive damages, I called to the Court's attention that fines, because of defiance of valid municipal or state directives, are evidence which is admissible for the jury's consideration, as to whether or not the acts were so wanton, reckless, indifferent, to the plaintiff's right so as to award punitive damages.

In my opening statement to the jury I referred to the fact that Cities Service stayed away from the hearings because they would have been fined $2500, and Monticello Gas attended the hearings and the fine was only $500. I think on that issue this information is truly significant and

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certainly relevant, and it would be for the jury.

MR. COLIN: May I respond, your Honor?

MR. ORSECK: There are admissions, furthermore. Cities Service takes the position they are not responsible for the omissions of Monticello Gas & Oil, and here, of course, there is language which minimally would permit the jury to infer that they do ratify the acts of Monticello. In my memorandum your Honor will see that ratification of unauthorized acts also constitutes valid proof.

THE COURT: Let me give consideration to that. I am puzzled by the position Cities Service takes here because in reading the stipulation of settlement in April of 1972, regardless of ownership or absence of ownership or control, Cities Service makes a commitment here in writing to act as if it were an owner. It seems to me, therefore, the niceties of ownership are almost irrelevant. By the commitment of a stipulation of settlement of April of '72 defendants are to pay the plaintiff certain monies. Defendants are to submit plans and specifications. The defendants agree and undertake to commence work to institute the improvements called for.

What difference does it make after April of 1972 what the ownership position is here, given the fact that Cities Service has committed itself to do all of these things?

If there is a breach of that commitment, isn't it the same as if they were there every day helping to pump the trucks?

MR. COLIN: I think not. What we are concerned with here is what is pleaded in this suit, and what is pleaded in this suit is that the operation of the oil terminal was conducted in such a way as to cause discharges that constitued a nuisance and trespass and negligence so far as this plaintiff was concerned. That liability can eventuate only from the operation and control of the premises and from no other causation. That operation and control is with MGO.

THE COURT: But Cities Service has committed itself to participate in the operation and control of that premises by agreeing to do certain things.

MR. COLIN: If we were sued for, let us say, a breach of what could be or might be assertively a contract represented by the stipulation of settlement in the former case, that might or might not pass muster as the basis of liability. It could be a contractual liability. It would be a very novel one --

THE COURT: You don't need to argue that further. I look at the second cause of action which speaks in trespass and says that the defendant Cities Service trespassed on the plaintiff's property by allowing things to happen that a

contractor would not allow to happen.

MR. COLIN: I don't think so. Trespass is based on action.

THE COURT: Or inaction, as the case may be, where there had been action which the defendant agreed to stop. It said: We are going to get rid of this oil; we are going to do this and that to stop it.

It does not stop and the oil keeps going. That's Cities Service' trespass.

MR. ORSECK: I would like to call the Court's attention --

THE COURT: I am throwing out observations here. We are now ruling on whether Exhibit 4 is admissible in whole or in part. It clearly is admissible in part. I will reserve decision over the lunch hour on the part I have raised some question about. It seems to me that the balance of this showing what was being done or what was not being done is an admission of the defendant and, therefore, Exhibit 4 will be admitted in part. I will reserve decision on whether it is admitted in whole.

MR. ORSECK: To be helpful on your deliberation--

THE COURT: Mr. Grubbs, I have not heard from you.

MR. GRUBBS: The only observation I would like to make is that I ask if it is admitted that the jury be instructed at the proper time that any interoffice memorandum of Cities Service is not a binding admission on my client.

MR. ORSECK: That's a matter which merits further argument.

THE COURT: I will give consideration to that thought.

MR. ORSECK: Would your Honor please note that in the complaint, paragraph 11-B states that the acts and conduct of the defendant constitute numerous violations of statutes, ordinances, and regulations of the State of New York and many of its departments and some municipalities; that such violations were a result of wanton, deliberate, reckless, et cetera -- that's an issue in the case.

One further short paragraph, paragraph 12-C, which would support your Honor's ruling as to document 4, that paragraph says that defendant Cities Service Oil Company has in all respects broken, repudiated, and violated the aforesaid agreement, and Cities Service denies it, so it is clearly a framed issue in this case.

Thank you.

THE COURT: What about 5?

MR. COLIN: 5 is a construction requisition and

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2 an internal document relating to the proposed sale of the
3 tank station. I see nothing in it which is indicative or
4 suggestive of a liability on the part of Cities Service, and
5 I object to its admission.
6 THE COURT: How about the last paragraph?
7 Does that show an awareness that there is a risk of further
8 pollution?
9 MR. COLIN: Since we are being exposed to
10 further damage claims --
11 THE COURT: By continued operation of this
12 facility.
13 MR. COLIN: -- and since substantial expendi-
14 tures would be required we propose to sell? I don't see
15 that that is anything except an expression of the rationale
16 of the author.
17 THE COURT: It seems to me a reasonable man
18 reading this would conclude an awareness on Cities Service'
19 part that the continued operation of this facility would mean
20 more oil in the culvert.
21 MR. COLIN: It says we are exposed to further
22 damage claimed.
23 THE COURT: By continued operation. Up above
24 they acknowledge they are under court order to install a
25 separator, and if they don't do that one could reasonably

conclude there would not be a separation.

MR. ORSECK: There is an admission that the soil is saturated with oil, which, on cross-examination of the witnesses, it seems apparent that Cities Service denies that allegation, and this document is an admission, or it may be inferred that it is an admission, that the soil is saturated with oil.

MR. COLIN: I don't see anything that is indicative of liability.

THE COURT: I will reserve decision on 5.

Mr. Grubbs, I take it unless you have something specific your position here goes to all of these being only binding against Cities Service at this point?

MR. GRUBBS: Exactly, your Honor.

THE COURT: Let's go to 6.

MR. COLIN: We object to that on the ground that it is subsequent to the date of institution of this action; that it purports to be in effect a historical synopsis of events by one not shown to be personally informed thereof, and that it contains nothing which is in any way indicative of liability on the part of Cities Service.

MR. ORSECK: Do you wish the plaintiff to be heard?

THE COURT: A little bit.

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MR. ORSECK: Number one, the defendants, for some reason, objected during the opening statement when I attempted to show the relationship of the parties, that Monticello Gas is a commission agent of the defendant Cities Service. This is an admission, and that's an important part of this case since we claim that Cities Service is liable for punitive damages, not only because of its own acts and inaction but because of that of Monticello Gas & Oil. It is relevant on that issue.

It is further evidence that there is an awareness of the Court's order and the directions of the State, which directions were made subsequent to the April 1972 action.

THE COURT: Mr. Orseck, let me say this: I think if we were to excise the amount of damages claimed in its February, 1973 suit, claimed by Doralee, in the amount of $137,500, if that language is out I would permit the letter to be put in evidence.

MR. ORSECK: The plaintiff has no objection.

THE COURT: Exhibit 6 will be received with that deletion.

Going through 7, it does not seem to me that 7 is really admissible on any theory.

I take that back. The second paragraph is what

you are talking about here?

MR. ORSECK: Yes, your Honor.

THE COURT: I will reserve decision on 7.

MR. COLIN: For the record, note my objection to the admission of this.

THE COURT: How about 8?

MR. COLIN: I object to the admission of this in evidence on the ground that it is subsequent to the institution of this suit and that there is nothing in it in any way indicative of liability of Cities Service in this action that relates in its content to a proposal for the sale of the real property by Cities Service to Monticello Gas & Oil.

THE COURT: That objection is overruled. I will admit 8.

Now as to 9.

MR. COLIN: I object to the receiving of this exhibit in evidence on the ground that it is dated a date subsequent to the institution of this action and that it contains nothing indicative or suggestive of liability on the part of Cities Service.

MR. ORSECK: This one is very relevant. It supports our contention that Cities Service is liable for the fine, and not only did they refuse to pay it to the municipality, they didn't want to reimburse Monticello Gas

for it, and it was their obligation under the court order, and under the order of Environmental Conservation. The most important thing is that --

THE COURT: You say it was their obligation under the court order?

MR. COLIN: It was neither our obligation under the administrative order or otherwise.

MR. ORSECK: It said either the defendants will cure it or dismantle the plant. I am talking about the October 24th order, the stipulation.

More important, Judge, the second sentence of the first paragraph says that we have asked that the bottoms of the tanks be pumped out.

The reason for that is to avoid, in other words, the last spill that Mr. Hudson testified to when they were dismantling the plant. They had the crane and we will show pictures of that. They took these big multi-thousand-gallon tanks up in the air and there were further oil spills as they dismantled the plant. This is supportive of the --

THE COURT: I will admit the first paragraph and exclude the second.

MR. ORSECK: Your Honor, with respect to the second, Cities Service was refusing to pay the fine for its agent, and we deem that that's an element in our punitive

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2 damage.

3 If the Court would refer to the memorandum of

4 law we supplied having to do with the issue of the award of

5 punitive damages against the principal for the ratified --

6 THE COURT: What difference does it make to

7 you? These people are having a little internal squabble as

8 to who is to pay the $500. That's not part of your case.

9 MR. ORSECK: The net result is that we want

10 to show there is an awareness of the fine.

11 THE COURT: The question is whether that should

12 be permitted by these letters. As to a dispute as to who is

13 to pay it --

14 MR. ORSECK: It would be admissible against

15 MGO. It would show that MGO --

16 THE COURT: This is not MGO's letter.

17 MR. ORSECK: It is our contention that MGO is

18 an agent of Cities Service.

19 THE COURT: I am not going to demonstrate that.

20 I will exclude the second paragraph and allow the first

21 paragraph of Exhibit 9 for identification.

22 Let us proceed to 10.

23 MR. ORSECK: 10 is admissible, I believe, on

24 a number of grounds.

25 THE COURT: Do you have any objection to No. 10,

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2 Mr. Colin? I take it this is a statement of somebody that

3 was engaged by your firm to do certain work because of the

4 reasons set forth in the statement.

5 MR. COLIN: I have no objection to the bill

6 and the attached agreement with the independent contractor

7 in so far as it shows that Cities Service Oil engaged him

8 for the removal of the surface of the property; but I do

9 object to it in so far as it may be offered to establish

10 liability on the part of Cities Service Oil Company.

11 Our position is that subsequent events are not

12 in any way admissions of liability by reason of their having

13 been effected.

14 THE COURT: This is subsequent to a stipulation

15 under which your client undertook to abate this problem.

16 In any event, you acknowledge it is admissible

17 except for that, and I will admit it to the extent consented.

18 MR. COLIN: I acknowledge it is admissible to

19 prove that the work to be undertaken was done.

20 THE COURT: Exhibit 10 will be received.

21 MR. ORSECK: That's 10 and 11, your Honor.

22 MR. COLIN: I object to Exhibit 11, your Honor.

23 This is a memorandum subsequent to the date of this action.

24 THE COURT: I will sustain the objection to

25 Exhibit 11, but not on that ground.

MR. COLIN: No. 12, your Honor, which is a bill for excavation of the premises, removing fences and debris and grading the property, I do not object to that and make the same qualified objection: I object to it in so far as it may be offered as an admission of liability on the part of Cities Service.

THE COURT: Exhibit 12 is received.

MR. ORSECK: Exhibit 13 is withdrawn.

MR. COLIN: I object to the marking in evidence of Exhibit 14 which consists of two separate pages on the ground that they are subsequent to the date of this action; that they relate to no matter which shows liability on the part of Cities Service Oil Company, and, in particular, I would say that we object that the expenditure of money by Cities Service Oil Company on these premises is in no way indicative of liability on the part of Cities Service.

THE COURT: Those objections are overruled. Exhibit 14 is received.

MR. ORSECK: Exhibit 15 is withdrawn, your Honor.

Exhibit 16 is withdrawn, your Honor.

Exhibit 17 is withdrawn, your Honor.

We press the letter of April 20th.

THE COURT: That is Exhibit 18 for identification.

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MR. COLIN: As to this one, your Honor, I object on the ground that it is not binding upon or indicative of liability on the part of Cities Service Oil Company. The administrative order involves only Monticello Gas & Oil Company. It appears to be an incomplete order, but I do believe it was ultimately entered. It is not binding on Cities Service Oil Company and, indeed, we might find it useful in our position.

MR. ORSECK: If it is useful in your own position why object to it? It does bind Cities Service to the extent it shows that they have notice that there was a violation and that they were expected to do something about it. To that extent it is certainly relevant.

It also shows an awareness.

THE COURT: I think that Mr. Orseck has a good point.

In the first sentence of the third paragraph it indicates that there is some joint action here or some authority that is necessary because, "Roy, please don't sit on this." That means that Roy has to do something before anything else is done. He is asking Roy Langbein, the author of this letter, to do something.

MR. COLIN: Because he correctly or incorrectly expected something. It is vaguely worded. If he incorrectly

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expected something, it does not bind Cities Service.

THE COURT: I will admit Exhibit 18.

MR. ORSECK: Exhibit 19 is an order, the original of which I don't have but which was signed by MGO and by the Commissioner of Environmental --

THE COURT: That's part of 18.

MR. ORSECK: I'm sorry.

THE COURT: That was an enclosure to 18.

MR. COLIN: 19 is objected to by us. This is after the institution of this action and contains nothing which imposes or suggests a liability on Cities Service.

THE COURT: I will sustain the objection, but not on that ground.

MR. COLIN: Thank you for any other ground, your Honor.

THE COURT: Exhibit 20 is the last one.

MR. ORSECK: This is an admission that Cities Service acknowledged the liability to comply with the State directives. It is evidence that they did comply with it, and, certainly, that inference is permissible, and on that ground it would clearly be admissible.

THE COURT: Why isn't Exhibit 20 admissible?

MR. COLIN: It is not, because it is a document dated after the institution of this action. It relates to

1 pgem

2 the proposed withdrawal of the prior requisition to sell the
3 premises for one dollar and an intention to do something
4 else at a later date. The reference to the fact that an
5 order was made by the Department of Environmental Conserva-
6 tion is in no way suggestive of liability on the part of
7 Cities Service. Indeed, the order was not directed to Cities
8 Service, and the reference to the fact that the land may have
9 been oil soaked does not indicate that Cities Service caused
10 them to be or is responsible for their being. It is a
11 reference to what may be deemed objective fact.
12 THE COURT: If Cities Service paid $6500, which
13 it did to comply -- this is the order that is annexed to that
14 earlier letter.
15 MR. COLIN: To clean up the premises.
16 THE COURT: If they laid out $6500, Cities
17 Service, and they comment that it has an investment in the
18 tank station, as it does in this memorandum, Exhibit 20,
19 wouldn't a reasonable juror conclude from that that that is
20 some responsibility on the part of Cities Service toward
21 this property?
22 MR. COLIN: The question of liability of an
23 owner of leased premises is a very clear and simple proposi-
24 tion of law. If I own a piece of property and I lease it to
25 somebody else who is vested with the complete control of the

premises, he has the responsibility for what happens or doesn't happen to those premises.

THE COURT: Even if you are right about that, the fact picture is complicated by the settlement of the earlier action in which your client undertook to settle.

MR. COLIN: Settlement of an action is never indicative of liability.

THE COURT: There was a contractual obligation.

MR. COLIN: That's not what this suit is about.

THE COURT: Certain aspects of this suit flow from that stipulation.

In any event, we do not need to belabor that. Exhibit 20 is admitted.

We will take a five-minute break for ourselves and then we will get the jury in.

I reserve decision on Exhibits 4, 5, and 7. I will also reserve on 13, 15, 16, 17, and 19.

(Part of Exhibit 4 received in evidence; Exhibits 6, 8, 9, 10, 12, 14, 18, and 20 received in evidence.)

(Recess.)

(Jury in box.)

THE COURT: Mr. Orseck, you may proceed.

MR. ORSECK: I call Peter Motl to the stand.

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2 M A T T H E W P E T E R M O T L, called as a wit-

3 ness on behalf of the plaintiff, having been first

4 duly sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

xxx 6 BY MR. ORSECK:

7 Q Where do you live?

8 A Monticello, New York.

9 Q Do you have a family there?

10 A Yes.

11 Q Until 1969 you were in the fuel oil and gaso-

12 line business or just fuel oil?

13 A Fuel oil and kerosene, 1961 to 1969.

14 Q Since then you have been in the taxi business,

15 have you not?

16 A Yes, sir.

17 Q Would you tell the jury who you sold your fuel

18 oil business to in 1969?

19 A Mr. Taylor.

20 Q From where?

21 A I don't quite understand your question.

22 Q Where is he from?

23 A Monticello, New York.

24 Q When you were in the fuel oil business, of

25 course you didn't manufacture or import the fuel yourself,

did you?

A No, sir. I bought it from Cities Service and then from Monticello Gas & Oil, and then from Cities Service.

Q Where did you get your product from physically? Where was the plant?

A Cold Spring Road in Monticello was the plant.

Q You have been here a little bit today?

A Yes.

Q The plant we are talking about is the plant that is involved in this litigation?

A Yes, sir.

Q From April of 1972 until the summer of 1973, did you still have business at the premises which you call Cities Service or Monticello Gas & Oil?

A Yes. I was in there, what you would call, occasionally, I would say: maybe once a month or twice a month to check on accounts receivable that I still had from the oil business itself. The man who bought my business didn't buy my accounts receivable and the secretary that Monticello Gas & Oil had would take money that people would drop off for me and give a receipt. I would be down there.

#5

Q In other words, when you sold your business, your fuel oil business, at that time some of your customers still owed you money?

A Yes, sir.

Q After you sold it either Cities Service or Monticello Gas & Oil collected these bills for you?

MR. COLIN: Objection.

MR. ORSECK: This is just clarification.

THE COURT: I will sustain that. What he said was that people would drop off money at MGO and he would pick it up.

Q Who collected your accounts receivable for you, if anybody?

A Well, they had a man whose name was Ralph Austin. He was with the company before I got there.

Q What company?

A Cities Service. He was their bookkeeper at the time and he took care of me fairly well. He would collect when people would come in. The office was shared with Eli Shapiro, who was the owner-distributor.

Q For Cities Service?

A Yes.

Q Right now, what I am talking about, is the period from 1972 to 1973. Did you meet with a Cities Service person or persons from time to time at the plant at Cold Spring Road during that time?

MR. COLIN: Objection, your Honor.

THE COURT: Overruled.

A Yes. I would pick up money that would be in a tin box.

Q When you talked about a Mr. Taylor, was Mr. Taylor an individual purchaser or was he somebody that was a representative of one who bought your business?

A No. He bought it himself outright.

Q While you were in business, did you ever drive a truck yourself to pick up product, oil product?

A Yes.

Q At that plant?

A Yes.

Q From time to time, did you observe oil being spilled on the ground?

MR. GRUBBS: I object if he is going prior to October of 1972.

A I was not driving --

THE COURT: Just a moment.

(Pause.)

MR. ORSECK: I would call to your Honor's attention the last cause of action.

THE COURT: I am going to overrule the objection. I may give a limiting instruction at some point as to the testimony concerning particular time periods, but at this

point I am admitting it.

You may answer.

How do you describe it?

THE WITNESS: The plant?

THE COURT: Did you drive into the plant?

THE WITNESS: Yes.

THE COURT: When did you do this?

THE WITNESS: Numerous times between when I sold the business and 1973.

THE COURT: Between 1969 and 1973?

THE WITNESS: Yes, sir.

Q We are talking about times when you drove in with a truck to pick up product.

A Not at that time.

Q During what period of time did you drive in with a truck to pick up oil at the depot at Cold Spring Road?

A When I owned the business, 1961 to 1969.

Q That's the period of time we are talking about.

A Yes, sir.

Q Tell us how you would pick up the product on any one of those occasions?

MR. GRUBBS: May I have a standing objection to all testimony as to what took place?

THE COURT: As to this witness, yes.

MR. COLIN: And I also, your Honor?

THE COURT: You may.

Proceed.

A The question was how did we load up?

Q Yes.

A The setup was B tank is what they call a fuel oil tank and C tank held fuel. They were lettered and C tank was on your right, which would hold 30,000 gallons, and B tank, where we would load from the platform, was a 10,000-gallon tank, and it was a gravity-feed operation. The pipe was about three inches in diameter.

Q Let me interrupt you for a moment.

By "gravity-feed" you mean that the big tank was higher than the lower tank, and the big tank fed the smaller tank?

A When I talk about gravity feed, yes. If B tank got below 5,000 gallons it ran very very slow, so in order to put the oil in they would have to pump from C tank to B tank so we could load, because it would get down to a certain level and you could not draw it, so we would not leave men on a truck. We would go in a shack. There is a shack where you were warm, coffee or whatever, and that's how we would load our product. We would try to watch the numbers on the meter so that you didn't overload and spill oil.

Q Did you ever observe oil being spilled during the period?

A Numerous times. I would say at least once a day.

Q What kind of quantities of oil did you notice spilled?

A Well, as far as my specifically knowing, I would not -- I had two trucks, and if we spilled maybe twenty gallons a day that was a lot of oil so far as loading goes.

As far as Cities Service at that time -- that's who I was buying the oil from -- they would spill oil by the pump. When B tank got too low to draw, they would be pumping from C tank to fill up B tank, and if the bookkeeper was not watching the electric pump, the oil should shoot out the vent down the yard and across the highway.

Q Did you ever see that happen?

A Quite a few times. We had to bring loads of sand in. The Village Barn is about a block away almost adjacent to Doralee bungalow colony, and the sand trucks would come in because the oil would just lay there. There was no place for the oil to go. In order to save the trucks the rubber, the expenses, they would come in and throw the sand down to absorb the oil.

Q In 1969 you sold your business; is that correct?

A Yes, sir.

Q And you told us that even though you sold your business in 1969 you continued to visit the premises at least monthly until the plant closed in the middle of 1973; is that correct?

A Right, because I had stuff that was mine down there that was like in storage. I had bill heads and stuff that was kept in what they call the garage part of that plant where they kept their motor oil that they sold and tires that they sold. I rented a certain space of that where I kept certain equipment that I needed for the truck, wrenches and stuff like that.

Q Did the loading practices continue the same way from 1969 to the year 1973 as they were when you were in business?

THE COURT: I sustain an objection to that on the grounds of form.

Q Did you have occasion from 1969 to 1973 to observe other trucks being loaded at the plant?

A Yes. When I would pop down there, there would always be trucks. There was a lot of companies that bought oil from Cities Service. It was not just Johnson Fuel Company, Rapid Heat, Countywide. Many trucks came in there and bought oil from Cities Service or Monticello Gas & Oil.

Q From 1969 to 1972, to your knowledge, did Monticello Gas & Oil and Cities Service, the number of gallons, increase in sales?

MR. COLIN: Objection.

THE COURT: It has to do with those sales they are. You have not established anything about that. Let's stick with your original subject, which is what he observed about the pumping.

Q What did you observe about the loading of these other trucks that you just told us about from 1969 until the plant closed in 1973?

A Whenever these trucks would be in you would pull up to the loading rack and, of course, you sell oil in the wintertime and it is very cold -- we had zero temperatures.

Q I am talking about your observations of your visits to the premises.

A I would come down and visit the different fellows I knew that drove for these different trucks and drove for me sometime part time.

Q What were your observations about the loading from 1969 to 1973?

MR. GRUBBS: If your Honor please, unless we have a more definite time and place I will object.

THE COURT: I will sustain the objection.

Q Let's talk about in 1972, April. Did you testify in court?

A Yes.

Q After that time, April of 1972, did you have occasion to visit the plant until it closed in the middle of 1973?

A Yes. I had friends down there.

Q During that period of time, did you observe other trucks being loaded?

A It was a very busy place, yes, sir.

Q Would you tell the Court and jury of your observations as to how the trucks were loaded during that period of time?

A Yes. It was done no different than any other period of time. I cannot say "we" because I was not loading the trucks at that time. I was in the office having a cup of coffee, but my observation, they would put the big pipe, the three-inch pipe, they would throw that into a compartment of the truck they were going to load and go in the office. It would be so cold you would not stand out on that rack. It would be zero, and five above, and the wind would be blowing. You would be in the office and watch your meter. You ran out and tried to catch it before you ran over the top.

Q Did you, during the period of time, April of 1972 to the middle of 1973, see oil being spilled at the premises during that time?

A Yes. Quite a few times.

Q Do you remember the last occasion that you were aware of oil being spilled on that plant before it closed down?

A They had a breakdown of tanks. They were dismantling the yard and moving to another location. I got word through a friend of mine that they had a real bad spill.

MR. GRUBBS: I object and ask that that be stricken.

THE COURT: Strike that.

Q Did you visit the premises at this time?

A I went by them. I didn't stop in there.

Q Did you see anything?

A Yes.

Q What did you see?

A A lot of oil all over the yard.

Q You told the jury before that this so-called B tank, if it had 5,000 gallons in it, it would --

A It would operate very slowly.

MR. ORSECK: That's all. Thank you.

xxx CROSS-EXAMINATION BY MR. COLIN:

Q Mr. Motl, how many taxicabs do you operate?

A I just drive one right now.

Q For how long have you been driving one cab, sir?

A For about six years.

Q That brings us back to what year, sir?

A L972, 1970, 1971.

Q You gave up your oil business in 1969?

A Yes, sir.

Q You went into the taxi business immediately after giving up the oil business?

A No, sir.

Q Did you do something else?

A No, sir. I just relaxed.

Q After you finished relaxing, you went into the taxi business; is that correct, sir?

A As a driver. I don't own a taxi. I just drive a taxi.

Q Do you drive days or nights?

A I drove three years nights, two years days, and now I am back on nights again.

Q What years did you drive nights, sir?

A Excuse me?

Q What years did you drive nights?

A Well, since last year and this year, nights. The other three years were days. I worked the day shift and then I worked the night shift.

Q I am trying to fix that.

You went into the taxi business as a driver in 1970; is that correct?

A Approximately right.

Q Did you work days or nights when you went into that business?

A The first three years, days.

Q What were the hours of driving for a day shift driver?

A It depended on what company you worked for. I worked for Yellow Cab, and we started shifts at five-thirty in the morning until five-thirty at night.

Q Those were the hours that you drove your day shift?

A That's right.

Q You did your driving within the city of Monticello principally?

A Yes, sir.

Q So until 1972 you were driving your cab during the day; is that correct?

A 1971, 1972, 1973.

Q Until about when in 1973 were you driving your cab days?

A I quit Yellow Cab in December.

Q The end of 1973?

A Yes.

Q You drove days up to that time?

A Yes.

Q Did you operate out of a hack stand in any particular place in Monticello?

A Yes, sir. Broadway.

Q That is the central point in Monticello?

A You got your dispatch call from there, that's right.

Q You waited there until you got a dispatch call?

A Either that or a walkup --

MR. ORSECK: I object, your Honor, in the interest of saving time. The ground of the objection is relevancy.

THE COURT: I am puzzled as to that myself.

MR. COLIN: I think, your Honor, it is very clear that this man was operating during the daytime and he was not doing other things during the daytime. This is cross-examination and this is what I am getting to.

THE COURT: I will overrule the objection.

Proceed.

Q When you were in the oil business, starting in 1961, where did you buy your oil?

A Cold Spring Road in Monticello from Cities Service.

Q Did there come a time in 1965 when you began to buy from Monticello Gas & Oil at the same oil plant?

A Same location.

Q 1965 was the year when Cities Service stopped operating and Monticello Gas & Oil became your supplier; is that correct?

MR. ORSECK: Objection.

THE COURT: Sustained as to form.

Q What was the first year you began to receive your supply from Monticello Gas & Oil at that oil plant?

A I can't remember that.

Q As well as you can, sir.

A It would be sometime in 1965.

Q Did you continue from 1965 through 1969 to obtain your oil from Monticello Gas & Oil Company at that plant?

A Yes, sir.

Q Aft er 1969 you were not buying at the plant any longer, correct?

A No, sir.

Q You mentioned Eli Shapiro.

A That's the name.

Q Was he connected with Monticello Gas & Oil Company, to your knowledge?

A I don't think so. I think he ran the franchise there for Cities Service.

Q Did you know anyone there connected with Monticello Gas & Oil Company?

A Yes, I did.

Q Whom did you know?

A I knew Mernie Deutch; I knew Doc Pantel; Seymour Kasten; there was a corporation -- Jerry Andrews.

Q Did the people, or some of the people you mentioned as connected with Monticello Gas & Oil, have their offices at the oil plant on Cold Spring Road?

A No. The only people that had offices at that plant was myself and at that time -- I paid all my bills to Eli Shapiro. In fact, I bought my oil right from Eli Shapiro.

Q Who was in the offices at the oil plant on Cold Spring Road?

A There were two offices. There was an office where the girls worked and another office where me and Eli split it up.

Q When you made a purchase after 1965 you received a bill on the billhead of Monticello Gas & Oil?

MR. ORSECK: I object to the form of the question.

THE COURT: I will overrule it.

A Yes. It was a bill heading.

Q You said that when you went out of the oil business some of your customers left money for you at the Cold Spring oil plant offices; is that right?

A That's correct.

Q Did you tell your customers to do that?

A They got into the habit. Certain people that were very slow payers would come down to the office and leave $20 on account, $50 on account.

Q That was agreeable with you?

A It was, because I didn't have that much heart into the business.

Q How long did it take you to collect the receivables that were owing to you as of the time you went out of the business in 1969?

A I still have money coming to me, sir.

Q Those are bad debts, I suppose?

MR. ORSECK: Objection. That's argumentative.

THE COURT: Strike it out. The jury will

disregard the question of counsel.

Q When did you receive your last payment at the Cold Spring Road offices by any customers?

A I cannot remember the date. I know the year was 1973. I think it was in the summertime sometime. Maybe late, around September.

Q Who paid you?

A Who paid me? I can't remember right now.

Q How many payments were made to you in 1973?

A Not too many. Very few.

Q One or two?

A Right.

Q How many payments were made to you at that office in 1972?

A A few more than would have been in 1973. Less and less every year.

Q Three or four?

A People would disregard it.

Q Do you know the date of each of those payments?

A No. Most of it was cash and I didn't keep a record, no.

Q How did you come to be informed that some of your debtors had left money for you at the office? Did someone call you from Monticello and tell you there was money

waiting for you?

A No. Sometimes that would happen. If there was a buildup of money in the cash box, they would call me, the girl, whoever was the secretary at the time; she had my number and would call me, but most of the time it was a drop-in. I lived there for eight or nine years. It was part of my life to get up in the morning, or whatever time I would take my break from my taxi or lunch hour, and run down there and see if I had any good will.

Q Whose secretary called you to tell you there was money waiting for you?

A I didn't say -- let's see who was the secretary: There was a lady working there by the name of Oshinsky at one time. Most of the time it was a dropin affair by me. I was welcome there. I was one of their biggest buyers. In fact, I was their biggest buyer.

Q In 1972, how often did you drive up to the oil terminal on Cold Spring Road to pay a social visit?

A I would say maybe once every other month.

Q That would be six times a year?

A That I went in and talked to people there? Spoke with people on the premises? Rode by the place?

Q That you went in and spoke to someone there.

A I would have done that more often because the

other drivers that worked for that outfit were my friends and we socialized together.

Q I am talking about your going into the premises.

A That's in the premises. I rode through the gate and parked my car and sat down and talked to the people.

Q In the office?

A Yes.

Q With whom did you speak?

A Ralph Austen, in the beginning. Then his son.

Q I'm talking about the year 1972.

A I can't be positive. There was a changeover of help. Key members stayed. I would talk to Mernie Deutch.

Q Who is Mr. Deutch?

A He was like Eli Shapiro; he managed before this corporation of MGO bought him out. He was a very personal friend of mine.

Q The manager of Monticello Gas & Oil?

A He was Eli Shapiro's manager for Cities Service, and then he was a manager for Monticello Gas & Oil.

Q After they bought into the business?

A That's correct.

Q That is 1965?

A Right.

Q When you went in there to talk to your friends,

did you, in fact, have conversations and discussions with your friends?

A Yes.

Q You had them inside the offices at the premises?

A Most of the time in the yard.

Q Most of the time in the yard?

A It was a very small office. His office didn't consist of from me to the judge.

Q So you had most of your discussions in the yard?

A Right.

Q Where in the yard?

A Where the tanks are.

Q While you were having discussions you were not paying attention to the process of loading any vehicles that were there, were you?

A You would have to. You would have to. The whole yard would not be maybe about the size of this building with everything taken out. It was a fenced-in area. It was not that large. The tanks were together. There was not much room. You can, maybe, park five trucks and three personal cars in that yard and that yard would be full.

Q When you had conversations with your friends in the yard, weren't there many times when your back was turned to the tanks?

A You have tanks on both sides of you.

Q Your back was turned to tanks on one side on certain occasions, was it not?

A Yes.

Q And your back was turned to the other side on certain other occasions; is that right?

A Yes.

Q And your back was turned to all the tanks on other occasions, was it not?

A Yes, sir.

Q When you were in the office you were not particularly there to observe how the loading was going on, were you?

A Yes, you would have to be. You had your personal car in there and with this spillage of oil in there you had to be ready to move it out.

Q Just so we get things to a proper frame of reference --

MR. ORSECK: I object to the preamble to the question.

THE COURT: Proceed.

Q I am talking now about the year 1972.

A I know what year you are talking about.

Q. I am confining my questions to that year.

Did you store your personal car at the Cold Spring plant in the year 1972?

A No, sir.

Q When was the last time you stored your car there?

A I didn't say I stored my car there.

MR. ORSECK: I object.

THE COURT: No foundation. Sustained.

Q Did you store any property belonging to you at that plant in 1972?

A I didn't pay storage for anything. I had stuff that was left there that was mine. It was just good will that they kept it there. They didn't ask me to get it out or anything.

Q You left it there since 1969?

A Yes, sir.

Q You said that you stopped in at the office to have coffee; I ask you, sir: How many times in 1972 did you stop in at the office to have coffee?

A I can't remember the exact amount of time. I didn't actually stop to have coffee all the time in 1972. I might have had fifteen minutes. I ran down there to see if there was something maybe left for me there or to say hello to a couple of friends of mine and I would come out.

Q How often did that happen, sir, in 1972?

MR. ORSECK: Your Honor, my objection is to the discretion of the Court. The Court has discretion to limit cross-examination not made in good faith. Far be it from me to try to cut off anything that has any relevancy in the case, but I think it is a waste of time.

THE COURT: This I question. It has been asked twice before, but we will have it one more time.

How often did you go down in 1972?

THE WITNESS: I would say a couple of times a month that I would actually go in there and check to see if I had something belonging to me.

Q This was during daytime hours?

A Yes, sir.

Q While you were on your taxi shift?

A It was not a shift that you had to drive a cab. It is like New York. You take a cab out and you give the cab back.

MR. COLIN: I have no further questions.

(Continued on next page.)

CROSS EXAMINATION BY MR. GRUBBS:

Q In January of 1973, how many times did you go to the plant on Cold Spring Road?

A Into the plant or by the plant?

Q How many times did you go into the plant?

A I would say maybe four or five times.

Q In January of 1973?

A Not in January of 1973. I would say I went there maybe nine or ten times on business for the whole year.

Q The whole year of what?

A 1973

Q How may of these nine or ten times were in January? That is what I am asking. Approximately.

A Two or three.

Q Two in January. How many times did you go in February to that plant on Cold Spring Road?

A I don't know if I went at all in February.

Q How about March? How may times did you go to that plant in March of 1973?

A Once or twice.

Q How many times did you go in April of 1973?

A I don't know.

Q Your best estimate, sir.

A Once or twice.

Q During the one or two visits you made during April of 1973, would you tell me who you talked to?

A Some friends of mine.

Q Tell us their names.

A George King was a driver.

Ira Duvall was a driver.

Like I say, my friend Merney Deutsch was there most of the time. They had another fellow there that was sort of an assistant manager, a bookkeeper-like. HIs name was Harry Lutsky. I don't know if he was there at that time or not. He has since moved away. He was not a friend of mine.

Q In other words, you talked to four people that you still recall the names of in April of 1973 at the Cold Spring Road plant; is that correct?

A Yes.

Q Would you tell us what these four people were doing during April of 1973 at the Cold Spring Road plant?

A Probably working. They worked there.

Q They- were working there?

A Yes.

Q These friends were working men? These friends you named waere working men at the plant?

A Right. They drove for one corporation or another, whoever was in there. If they were working for County-wide Oi

1 If they were working for Rapid Heat Oil --

2 Q They were using that plant at Cold Spring Road

3 during the month of April of 1973 when you visited those

4 four people; is that right?

5 A Yes, sir.

6 Q How about May of 1973. How many times did you go?

7 A I don't think I went at all during the summer

8 until late summer, maybe September.

9 Q September of 1973?

10 A Right. They were starting to dismantle. They

11 had another company plant like built out by the race track.

12 They were moving stuff, in the process of breaking it down

13 and in the process of getting out of there.

14 Q I just asked you, how many times in September --

15 MR. ORSECK: That is argumentative.

16 MR. GRUBBS: I move to strike the prior answer as

17 not being responsive. I asked specifically how many times

18 you went to the plant in Cold Spring Road in September.

19 THE COURT: You asked him in May and he said he

20 did not remember anything about the summer.

21 MR. GRUBBS: Now I ask about September.

22 Q Give us your best estimate of how many times.

23 THE COURT: If at all.

24 A Twice maybe.

25

Q What were they doing once or twice when you went there? What would be taking place at the Cold Spring plant at that time?

MR. ORSECK: Didn't he say that? I don't want to be a jack in the box.

THE COURT: I sustainthe objection. He said maybe he went there.

And maybe he did not; is that right?

THE WITNESS: Right. I don't claim that I was there -- that I could say three times exactly, once exactly, twice exactly. I don't really know. I know I walked in. I had my own place where they kept money for me. I went in, checked it if there was anything in my box and if not, I left.

Q Did you do that in September of 1973?

A I don't remember.

Q How about October of '73?

A No. That would be definitely out.

Q In the first action by Doralee, Inc. in the Supreme Court of Sullivan County, did you come and testify on behalf of Doralee?

A Yes.

Q How much time did you spend in the court on that occasion?

A Maybe twenty minutes.

Q And had you talked to their attorney prior to coming to court?

A I was subpoenaed by their attorney.

Q Did you talk to their attorney prior to coming to court?

A No.

Q Did you talk to anybody in the office of that attorney?

A No.

Q So until you received the subpoena you had never discussed what you knew or didn't know with the attorney for Doralee, Inc.; is that right?

A That's correct. Their attorney at that time was my attorney.

Q Mr. Drew was your attorney?

A Right.

Q Did Mr. Drew ever talk to you about the case?

A No. He didn't involve himself in that.

Q Did you ever tell him what you knew?

A No. They asked me questions on the stand like what happened at that place and I answered them.

Q We are talking about before you got to court?

A No. You mean did I need a preparation before I

1 came in here? No.

2 Q Did you ever tell Mr. Drew what, if anything, you

3 knew about the case that he was prosecuting for Doralee,

4 Inc.?

5 A I didn't know he was prosecuting one until he

6 handed me a subpoena to show up there.

7 Q You never told him you had any information on

8 this subject of his suit?

9 A No.

10 Q Did you ever tell anybody from Doralee or anybody

11 associated with Doralee?

12 A No. I did not know the people.

13 MR. ORSECK: Would this be relevant, your

14 Honor --

15 THE COURT: Overruled.

16 Q How long had Mr. Drew been your attorney before

17 he prosecuted the case for Doralee?

18 A Teddy Drew was my attorney since I was in the

19 business. He set up a corporation for me.

20 Q When was that?

21 A 1961 through 1969. Then he was my own private

22 attorney for personal matters up until now.

23 Q In other words, Mr. Drew has been your attorney

24 all along since the time you organized the oil business; is

25

that correct?

A That's correct.

Q And in connection with the legal matters you had in operating the oil business you consulted him, did you not?

A My business?

Q Yes.

A Yes.

Q You say your attorney right up to the present time is he?

A Yes. Until today.

Q When he subpoenaed you to come to court on behalf of Doralee in 1972, you had never discussed the subject of oil spills with him at all; is that correct?

A No, sir. For what reason would I?

Q He just put you on subpoena and put you on the stand and started asking questions?

A He knew I lived down there. He knew I was a person that worked out of that place. He wanted to find out something and he picked on somebody and picked on me.

Q Didn't he ask you those questions before he subpoenaed you?

A No.

MR. ORBECK: Before I jumped up and it was repetitious and now --

THE COURT: Overruled.

A He never asked me any questions about Doralee or spill in oil until the day I walked into that court and he asked me what went on there.

Q Until you got up on the stand, in other words --

THE COURT: That is what he said. Do not repeat it.

Q Since that time have you had any conversation with anyone representing Doralee up to the present day?

A No.

Q Do you never talked to anybody else about what you saw until you got up on the stand; is that correct?

A I first met Mr. Orseck today. I didn't know the man.

Q I didn't ask you that.

MR. ORSECK: That was responsive.

Q Did you talk to anybody representing Doralee or associated with Doralee before coming here today?

A No.

Q When did you receive your subpoena?

A The 2nd of January I think it was. I was supposed to come down here for the 3rd and was told by the fellow that was supposed to pick me up that I would not have to be here until the 4th.

Q Who was supposed to pick you up?

A Phil Edison.

Q With whom is he associated?

A I don't know.

Q Who served the subpoena on you?

A I don't know. I don't know a process server. The man handed me a subpoena.

Q Did you receive any compensation for the time you lost in testifying in the first action?

MR. ORSECK: Is that relevant here?

A I don't understand. I don't understand your question.

Q What were you given to come to court today? Were you given a fee when you were subpoenaed?

A I was paid for my day to come down here, yes.

Q What were you paid?

A $100.

Q How about when you testified in the other case. Did you receive anything? Did your regular attorney pay you anything for coming to court in behalf of Doralee?

A I could not remember that. If it was it was very small.

Q You yourself spilled oil. Didn't you do something about it? Didn't you see there was sand put down?

A That was not my job to do that.

Q I am asking you, did you?

A No.

Q Did you see anything done after the oil spill?

A Yes. Whoever was in charge of the plant called for the sand trucks which were less than half a block away, and they would come in and drop a load of sand down and try to sop up the oil.

Q That was done after there was a spill?

A No. Sometimes it would go two or three days. You would come in in the morning and there would be oil all over the yard and it would be from a previous spill.

Q Did you walk through that?

A You would have to.

Q Didn't you ask anybody to get sand there?

A It does not do too much good when you are not paying for it yourself.

Q Didn't you say you were a good customer?

A I was probably their No. 1 customer.

Q And so you would continue to walk through the oil without having asked to have sand put on?

Sand is only a half a block away; is that correct?

A Right.

Q Did you ever get charged for the oil you spilled?

A You get charged for every gallon you buy there.

Q Did you pay for the oil you spilled?

A I sure did.

MR. ORSECK: He did not say he spilled any.

THE COURT: I will sustain that.

Q Did you spill any oil yourself?

A Sure.

Q Did you pay for the oil?

A I was billed for it. I had to pay him. I don't owe him a nickel today.

Q You did pay for it?

A Right.

Q So wasn't it to your interest not to spill oil when you were going to pay for it without being able to use it?

A Sure it is within your interest but you can't help certain things that happen. They were things that happened with every person that was in there buying oil from them.

Q Isn't it true that all you had to do was to be careful enough when you got near the top of your tank to turn it off?

MR. ORSECK: Your Honor, he is not a defendant in the case.

THE COURT: I understand. Let's go ahead.

Q Answer that.

A I don't think it was up to me to turn the oil off. I was just buying the oil, sir. I do not operate Cities Service plant.

Q Did you ever turn the tank off?

A Plenty of times when you see something spilling over like that. Sure.

Q Because you were paying for it?

A Yes. I was billed for it and I was paying for it.

MR. GRUBBS: That's all.

MR. ORSECK: No questions.

THE COURT: You are excused.

(Witness excused.)

(Luncheon recess.)

AFTERNOON SESSION - 2:15 P.M.

(Jury in box.)

MR. ORSECK: Your Honor, the plaintiff now respectfully requests leave to read to the jury portions of the deposition of John Kwak who, I believe, all counsel will stipulate, is a witness and who is Assistant Sanitary Engin-- eer with the New York State Department of Environmental Conservation.

THE COURT: Is there any problem with that, counsel?

MR. COLIN: I agree. Mr. Kwak's deposition was taken as a witness.

MR. GRUBBS: Yes.

THE COURT: You may proceed.

MR. ORSECK: Ladies and gentlemen, this deposition was taken at the offices of the New York State Department of Health up in Monticello, Sullivan County, on September 27, 1973.

The man who was asked questions and who answered them was John Kwak, an Assistant Engineer for the New York State Department of Environmental Conservation.

At the examination were Mr. Colin on behalf of Cities Service. There was a Mr. Robert Dow who, at the time, appeared for Mr. Grubbs; I was present too.

I will now read portions of the examination of Mr. Kwak.

"Examination by Mr. Orseck:

"Q Mr. Kwak, would you give us your occupation" --

THE COURT: He was duly sworn, I assume? He was under oath and was examined by you?

MR. ORSECK: Correct.

I will continue to read:

"Q Mr. Kwak, would you give us your occupation, your official capacity?

"A I'm an Assistant Sanitary Engineer with the New York State Department of Environmental Conservation.

"Q Today, pursuant to a notice served upon you by my office, you appeared here with your file concerning Monticello Gas & Oil plant on Cold Spring Road, Monticello, New York?

"A Correct.

"Q All counsel present examined your file this morning?

"A That's correct.

"Q You are aware that we have marked 16 of those items for identification?

"A Right.

"Q Now with regard to document No. 1, which is the Water Pollution case report, that was prepared under your supervision?

"A Yes."

MR. ORSECK: I represent to the Court that the Water Pollution report was the same document referred to by Mr. Hudson, that being Exhibit 4 for identification.

I would offer that document in evidence at this time.

I would ask that the original from Mr. Kwak's file --

MR. COLIN: Exhibit 4 for identification is not this document. Check that, please.

MR. ORSECK: I would ask that it be marked then as the next exhibit.

THE COURT: Let's go ahead and mark something.

(Plaintiff's Exhibit 21 marked for identification.)

xxx

MR. ORSECK: I call to the Court's attention that in connection with this document later in the deposition Mr. Colin examined with respect to its contents in detail.

(Pause.)

MR. ORSECK: I call to the Court's attention

that the document is part of the State file kept in the ordinary course.

(Pause.)

MR. COLIN: I object to the marking of this in evidence on the ground it is not binding on Cities Service Oil Company and relates to observations made by an unidentified person at premises clearly identified to be those of Monticello Gas & Oil Company.

As to Cities Service, I object to it.

MR. GRUBBS: If your Honor pleases, I respectfully object to this document. Apparently it contains certain comments by persons unsigned, and it has been made by someone not subject to cross-examination before this court and jury.

MR. ORSECK: Mr. Kwak testified --

THE COURT: According to the document, Mr. Kwak, as I see it on page 3, is the observer.

MR. GRUBBS: He would be in this court and subject to cross-examination.

THE COURT: It was his deposition that was being taken so he could have been cross-examined on that deposition.

MR. GRUBBS: A deposition is not for cross-examination; it is for the purpose of obtaining information from a witness.

THE COURT: That objection I overrule.

Is there any other objection?

MR. GRUBBS: No proper foundation.

THE COURT: What is the absence of foundation? There are certain things in here I would exclude, but the document in certain particulars I deem to be admissible. I will go through it at the first recess.

MR. COLIN: There is one problem relating to this document: There is a single date of inspection referred to on page 3 of the document whereas at the top right of the document on the first page there are a number of dates referred to, and I think that is difficult to evaluate in terms of the obvious contradiction between the multiple dates and the single date.

MR. ORSECK: Since your Honor has reserved, may I proceed to read the deposition which I am sure will be useful in the Court making its ruling?

THE COURT: Go ahead.

MR. ORSECK: I am reading from the middle of page 7:

"Q Now, the second item, the fishkill report, that was prepared with your participation or at your instruction?

"A No.

"Q Is it customary in DEC cases to obtain fishkill reports when part of the subject of the case is complaints of fish being killed?"

MR. COLIN: Objection, your Honor.

MR. GRUBBS: I also object. I objected to it at the time of the deposition.

THE COURT: What is the matter with the form?

MR. COLIN: It is leading.

THE COURT: I will overrule that objection.

MR. ORSECK: I will continue.

"A Yes, it is.

"Q Is Avon Pollution Investigations Unit a division of DEC?

"A It is.

"Q Was the fishkill report, that's item No. 2, made by Avon Pollutions Investigations Unit?

"A It was."

MR. ORSECK: The middle of page 9:

"Q Now, notwithstanding document No. 2, the fishkill report, did you have occasion at all, at any time, to see, to visit the Doralee premises opposite the Monticello Gas & Oil plant?

"A I've been there a numb er of times.

"Q During any of the times there did you

pgem "Kwak - Dep.

observe dead fish or fish dying?

"A I did.

"Q Do you know about when that was?

"A It was the date of the original hearing of Doralee versus MGO.

"Q And if I told you that was the end of April 1972 would that refresh your recollection?

"A I would have to look at my calendar.

"Q In your file there is a subpoena for that hearing returnable in April, would that refresh your recollection?

"A Yes.

"Q At that time would you tell us what you observed by way of fish?"

MR. ORSECK: I am skipping a little bit.

"A I'll try. In 1972?

"Q Yes, in April of '72.

"A The subpoena tells me to be there the 22nd day of March.

"Q Mr. Kwak, I ask you whether or not the dates of inspection as indicated on document No. 1 -- the Water Pollution case reports, are the dates April 13, 1972 and April 20, 1972 and the dates of inspection refresh your recollection?"

MR. ORSECK: The middle of page 11:

"MR. COLIN: Are you talking about the court case?

"A Yes, there was a recess for me to look at the lake.

"MR. DOW: Who was that?

"A Mr. Krieger.

"MR. DOW: Who is Mr. Krieger associated with?

"A He was the attorney for MGO.

"MR. DOW: And yourself?

"A Myself and Ted Drew's assistant, Anthony Kane."

MR. ORSECK: The first question on page 12:

"Q Tell us what you observed on that date.

"A Dead fish were observed in the lower Doralee pond.

"Q Mr. Kwak, in your Water Pollution case report, which is document No. 1, that was prepared either by you or under your supervision?

"A Yes, it was.

"Q On page 6 under item 13, there was a finding made, was that your finding as indicated on the report?

"A Page 6, item 13?

"Q Yes.

"A Yes, it was.

"Q And the comments made in item 17 on page 7, they were your comments, were they not?"

MR. ORSECK: There was an objection to form, your Honor.

THE COURT: Overruled.

MR. ORSECK: I will continue.

"A Yes, it is.

"Q Now, on February 28th the attorney for your office, Nicholas Vazzana, served notice upon MGO that a hearing would be conducted March 29, 1973 regarding a failure by MGO to stop discharging oil into a roadside ditch."

MR. GRUBBS: I object to the form of the question, your Honor.

THE COURT: The objection as to the characterization of the letter -- do we have the letter?

MR. ORSECK: We have the letter.

THE COURT: Mr. Grubbs, your colleague's objection was not to anything other than the way the letter was characterized. Would you prefer that we use the letter itself?

MR. GRUBBS: The form of the question is bad. If the question just refers to the date of a specific letter,

I have no objection.

MR. ORSECK: The form cannot be raised on a deposition because there is no opportunity to correct it.

THE COURT: The best evidence is the letter if you don't like the way it is characterized.

MR. GRUBBS: If there is a foundation for the letter --

THE COURT: He received a copy of the letter. Perhaps we should put the letter in.

MR. GRUBBS: I think if a question is not properly asked by counsel there is no obligation on anyone to remedy the faulty question. I think if he wants to refer to a specific letter in his deposition and say, "Did you receive a certain letter," that would not have been objected to.

THE COURT: That's the next question.

MR. GRUBBS: This question I object to.

THE COURT: I sustain your objection as to that.

MR. ORSECK: I will continue:

"Q You received a copy of that letter, did you not?

"A I did.

"Q Do you know what circumstances precipitated the writing of that letter by Mr. Vazzana?"

MR. ORSECK: There was an objection to the form, your Honor.

THE COURT: Let me see the letter.

(Pause.)

MR. ORSECK: Your Honor --

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: Why should not this letter go into evidence?

MR. COLIN: You are going beyond the objection that is before you at this time.

THE COURT: I know. We are all lawyers here and there is no question against the letter that is being referred to.

MR. COLIN: My only question was, why did somebody else write it to him? I don't think he can possibly answer that.

THE COURT: I am going to sustain that objection.

MR. COLIN: I have no position about that letter.

MR. ORSECK: Mr. Greene is in court. We have stipulated that these letters were all received and all it does, it is a time burden. I don't suppose anybody cares with respect to me.

MR. GRUBBS: Merely the fact that somebody was asked to come down to a hearing has no significance.

THE COURT: It does have significance on the failure to abide by the stipulation.

MR. GRUBBS: I don't think the fact that I come down and ask for a hearing, if I decided to come to a proceeding, that has no evidentiary value at all that there has been any violation.

THE COURT: I agree with that. If you want me to, I will so instruct the jury in that connection.

MR. GRUBBS: I object to its admission. It has no probative value that somebody has received a letter to come down to a hearing.

MR. ORSECK: The next thing is the hearing.

THE COURT: Somehow or other I agree with you that in and of itself it has no significance. Do you want to stipulate that there was a hearing and the parties attended?

MR. GRUBBS: I think he should bring that out in proper form.

THE COURT: He cannot do it from this. The question is to be reasonable men. How can we bring this to pass without spending twenty minutes on this issue?

MR. GRUBBS: My man was subpoenaed for two days in court.

MR. ORSECK: If you would cooperate for the obvious --

THE COURT: Is there any question that there was a hearing before the Department of Environmental Conservation on Thursday, March 29, 1973?

MR. GRUBBS: If that's all he wants to get in --

THE COURT: So far. Is there any question that there was such a hearing?

MR. GRUBBS: I don't know the date or the time.

MR. COLIN: Involving MGO and not Cities Service.

MR. ORSECK: It is chronologic.

THE COURT: Is there any question that there was a hearing and that your client, Mr. Greene, was invited to attend?

MR. GRUBBS: If it stopped there, that's all.

THE COURT: May I state that to the jury as a stipulation of the parties?

MR. GRUBBS: Surely.

(In open court.)

THE COURT: Ladies and gentlemen, it has been stipulated by counsel that there was a hearing before the Department of Environmental Conservation in New Paltz, New York, at two o'clock on Thursday, March 29, 1973, and that Mr. Sam Greene, here designated as manager of the

Monticello Gas & Oil Company, Cold Spring Road in Monticello, was requested to attend that hearing. This letter is signed by Nicholas Vazzana, Regional Attorney, I take it, of the Department.

That is stipulated.

Do you have a copy of this, by the way, Exhibit 21, that I could mark?

MR. ORSECK: Yes.

THE COURT: May I have a copy of it?

MR. ORSECK: Surely.

(Pause.)

MR. ORSECK: The counterpart was Exhibit 2 for identification.

Now we will go back to page 14:

"Q Was there a hearing as the result of the letter of February 28, 1973?

"A An informal hearing was held and my records indicate the hearing was held on April 4, 1973.

"Q And at that time on a yellow piece of paper you took some perfunctory sketchy notes, is that correct?

"A Yes, I did.

"Q And that is a document counsel had marked

No. 15?"

MR. ORSECK: Again, there is an objection to form. I can't figure out what the objection is, but it is there.

THE COURT: Overruled.

MR. ORSECK: I will continue:

"Q Now, to your knowledge, did that hearing"--

THE COURT: Skip down to the bottom. There was an objection to that. Skip to the bottom.

MR. ORSECK: Yes, your Honor:

"Q Do you know what the result of the hearing was?

"A I was present at the hearing and it resulted in a consent order, the items of which were previously consented to by Mr. Sam Greene, who was the individual present for MGO.

"Q Now, we have a marked and unsigned copy of a document which is labeled Order of Consent as No. 5, and I ask you if that is the document which Mr. Greene agreed to?"

MR. ORSECK: There was an objection, your Honor.

THE COURT: Overruled.

MR. GRUBBS: I ask that the answer be read.

MR. ORSECK: I will continue;

"A No.

"Q To your knowledge did Mr. Greene subsequently at any time execute document No. 5?

"A You mean did he sign it?

"Q Yes."

MR. ORSECK: There was an objection, your Honor.

THE COURT: It was not raised.

MR. ORSECK: I now go to page 18, the middle of the page. These are questions asked not by me but by Mr. Colin:

"Q Mr. Kwak, referring to Exhibit 1" --

MR. GRUBBS: I object. The questions that follow logically are required to be read at this time or it will be misleading to the jury.

MR. ORSECK: Don't worry about me misleading the jury. He can read what he wants.

THE COURT: Where did you stop?

MR. GRUBBS: Page 15.

MR. ORSECK: I will read all of that where they deny that they signed --

THE COURT: Counsel, don't argue the case here. You go ahead to page 18. I don't think this

is a case where that's necessarily true.

MR. ORSECK: I will continue:

"Q Mr. Kwak, referring to Exhibit 1 marked today," --

MR. ORSECK: May I comment that that is Exhibit 2 for identification, and also Exhibit 21.

I'll begin again:

"Q Mr. Kwak, referring to Exhibit 1 marked today, the Water Pollution case report, how many inspections of the Monticello Gas & Oil premises did you make?

"A Officially only the ones that are noted.

"Q And that means five inspections as noted against the dates of inspection, is that correct, sir?

"A Yes.

"Q As a result of your inspections do you have an opinion as to the reason for the emission of oil from the premises?

"A Yes, I do.

"Q Is it your opinion, sir, that the emission of oil from the premises is due to the manner in which it was operated?"

MR. GRUBBS: I object to any opinion.

THE COURT: Overruled.

MR. ORSECK: I continue.

"A Yes.

"Q What, in respect to the manner of operation, in your opinion, constitutes the reason for oil emission?"

MR. ORSECK: Another objection, your Honor.

THE COURT: I overrule it.

MR. ORSECK: I continue.

"A In my opinion any oil which emanates from an oil storage area is due to operational mismanagement."

MR. GRUBBS: I move to strike the answer.

THE COURT: Denied.

MR. ORSECK: Continuing:

"Q Is Exhibit 1 a report prepared by you?

"A Yes.

"Q The report refers to, and I'm now directing your attention to the last page, to a small oil trap which is not maintained and operated, is that in your opinion, a factor in the emission of oil from the premises?

"A Yes.

"Q Would spillage of oil onto the surface of the premises result in oil emission?

"A The way the existing system was designed, yes.

"Q And what do you mean by that, sir?

"A I mean by that that the drainage system and the oil catchment system that was installed at the MGO site was inadequate to contain the oil on a year-round basis.

"Q To contain what oil?

"A Any spilled oil.

"Q Do you know, of your own knowledge, of any spillages?

"A I have personally been at the site when I saw that the system was clogged with snow and oil was discharging past the drainage system.

"Q You didn't answer my question. Do you know, do you know of any spillages of your own knowledge?

"A I have not personally seen any oil being spilled at the site.

"Q The snow-clogged facility that you mentioned, would you describe that more fully, please?

"A The site had or has a concrete culvert along the Cold Spring side of the property. That was filled with snow and oil, oily water being discharged

over this culvert into the roadside ditch.

"MR. DOW: Can you place the time when you saw this, when you made this observation?

"A April 13, 1972.

"MR. DOW: Would that be with snow?

"A This might have been a later date.

"Q What effect, if any, does the presence of snow in the culvert have on the emission of oil?

"A The way it was designed the opening into the oil, so-called oil trap, about a four-inch opening to my recollection, and this was plugged with snow and was repeatedly so. Drainage water had to bypass the oil trap.

"Q When you say oil trap, you mean the same thing as culvert to which you previously referred?

"A No, the oil trap was a 55, two 55-gallon drums in series that were supposed to float out the oil before discharge to the stream.

"Q Where were the two drums located?

"A Approximately ten feet from the gate on Cold Spring Road.

"Q And were they piped to any other plant facility?

"A No.

"Q Were they closed drums?

"A They were 55-gallon drums sunk vertically into the ground with loose covers on the top.

"Q With loose covers, you mean they were open?

"A They were open but had steel plates over the top of them.

"Q And what function were these supposed to perform?

"A The drainage water from the property is supposed to be conducted to these culvert ditches which were better called concrete ditches -- to the first 55-gallon drum and by a piping arrangement in this drum the oil was supposed to float on top and the water was supposed to be discharged from the lower part of the drum."

MR. ORSECK: The middle of page 23:

"Q Now, you say you obser ved a non-functioning of these drums by reason of snow at a particular time, is that right, sir?

"A Correct.

"Q And did you fix the time?

"A I did not.

"Q Would you fix the time?

"A I cannot remember the exact date.

"Q What month of the year?

"A It would be in the spring of '72, that's as close as I can get.

"Q And what was the snow clogging that you observed?

"A Snow was piled through the entire concrete ditch and the 55-gallon oil traps were plugged with snow and thereby not functioning.

"Q Now if these drums had been properly and regularly serviced in the manner that you previously described, would there have been substantial control of oil emissions from the premises?"

MR. GRUBBS: Objection.

MR. ORSECK: Your Honor, it was asked again and answered on the next page.

THE COURT: I overrule the objection, but I don't see where the answer is.

MR. ORSECK: The middle of page 25:

"A No, they would not."

MR. GRUBBS: I ask that the questions and answers be given in sequence.

THE COURT: I think you'd better.

MR. ORSECK: I will read the question again:

"Q Now, if these drums had been properly and regularly serviced in the manner that you previously described, would there have been a substantial control of oil emissions from the premises? Go ahead, sir.

"A The concrete ditches are only constructed along the Cold Spring roadside of the property. Oil emissions were noted from the railroad right-of-way side of the property.

"Q You did not answer my question, would you answer it?

"A No, they would not.

"Q Is it your belief that regular skimming of the oil from the surface of the two drums would not have effected a control of reduction of oil emissions from the premises?"

MR. GRUBBS: Objection, your Honor.

THE COURT: Overruled.

MR. ORSECK: I will continue:

"A If they were properly operated they would have effected some reduction of the emission of the oil."

MR. ORSECK: The middle of page 30:

"Q Do you have in your files any detail or

information with regard to the oil spill that is stated to have been referred to by Officer Schlant?

"A You'll note on my case report that April 20th was one of the days of an inspection. April 20th is one of the days that my office inspected the MGO site which resulted in my report and the report stands by itself."

MR. ORSECK: The bottom of page 31:

"Q What is your education?

"A I am a graduate civil engineer and options within the civil engineering field I am a sanitary engineer."

#7 MR. ORSECK: I now turn to page 36:

"Q Now, did you tell us earlier that, in your opinion, the manner in which the existing system, that is the drainage ditch system, with these two 55-gallon drums, that the manner in which that was designed to contain spilled oil?

"A It is my opinion as an engineer that those two 55-gallon traps were inadequate to properly separate the oil from the water before discharge to the roadside ditch. This opinion comes from the total drainage, considering the total rainfall and drainage of the melting snow that could emanate from the

property, those drains are very small.

"Q Do you have an opinion as to the manner in which these inadequacies you indicated to us could be corrected?

"A I believe my letter to MGO dated April 17, 1972 --"

MR. ORSECK: I interrupted to say this:

"Might the record indicate that document No.17 for identification is about to be marked by the stenographer, being a letter from Mr. Kwak on behalf of DEC to MGO dated April 17, 1972."

Now the witness goes back to his answer.

"A I believe my letter to MGO dated April 17, 1972 indicates on page 2 what should be done by MGO to correct the discharge of oily water."

MR. ORSECK: Your Honor, at this time I would ask that that be marked. There was no objection to it at the time that inquiry was made. If there had been objection at the time it would have been developed further. Consequently I deem, in my opinion, that to be a concession.

THE COURT: You offer that in evidence?

MR. ORSECK: I offer the April 17th letter in evidence.

Your Honor, might the record indicate that the

letter of April 17th -- this is what I was getting at yesterday -- is the letter, the first portion of which was prepared by Mr. Hudson. It is Exhibit 3 in evidence, part of which your Honor has admitted. It was referred to unconditionally in the deposition.

THE COURT: We are specifically talking about here a paragraph on the second page which has the number 2 and the parentheses after that. I think that's the only thing we are talking about here.

MR. COLIN: Your Honor, my objection to the marking of this document is that it is not addressed to Cities Service Oil Company. It is addressed only to Monticello Gas & Oil Company.

I would ask that if your Honor does receive it in evidence you should instruct the jury that it has no binding effect on Cities Service.

THE COURT: It is only being offered against Monticello.

MR. GRUBBS: I understand that he is only offering it --

MR. ORSECK: I am offering the balance.

MR. GRUBBS: I object.

THE COURT: It is only admissible as to this paragraph two.

MR. GRUBBS: I have no objection. The second paragraph is highly objectionable.

THE COURT: I am not admitting that on the first page. I admit the paragraph that bears upon what his proposal was.

Exhibit 3, which is partially in evidence, is now further in evidence to the extent that the paragraph on page 2, preceded by a numeral 2 and followed by a parenthesis--

MR. COLIN: Isn't your Honor's ruling, sir, that this entire document relates only to Monticello and not to Cities Service?

THE COURT: That's not so. It was the first part of it. It is a contemporaneous memorandum made by Mr. Hudson. I will instruct the jury that the second portion I have just admitted is addressed only to Monticello. Thereafter it is only binding upon them as of this moment.

MR. COLIN: As a letter addressed to Monticello for itself I submit that it is not binding on Cities Service.

THE COURT: The first part is Mr. Hudson's contemporaneous memorandum of circumstances as he found them and as a fact statement of existing circumstances and is admissible generally.

MR. ORSECK: I now read from the middle of page 37:

"Q Is it your opinion, Mr. Kwak, that the procedures outlined in your letter of April 17th would have eliminated the inadequacies in regard to this draining system.

"A What I required was that MGO submit an engineering report and plan of the MGO property whereby all surface drainage from the property would be conducted into an oil trap which would be large enough to contain the oil for a sixty-day period and which would provide for an easy method for oil removal."

MR. ORSECK: Now to the middle of page 39:

"Q Now, there was an exhibit marked earlier, and that was the consent order of April 1973, plaintiff's Exhibit No. 5, I believe you indicated that the consent order in the form that it was shown to you was not signed, is that correct?

"A Correct.

"Q Were there certain modifications made to that consent order?

"A Not to my knowledge.

"Q But it was eventually signed, is that correct, by all parties?

"A As far as I know."

MR. ORSECK: Your Honor, I reoffer that consent

order.

THE COURT: Which is that?

This is already in, is it not?

MR. ORSECK: No, your Honor.

THE COURT: Let me look at Exhibits 9 through 20.

(Pause.)

MR. ORSECK: For simplicity, I would call upon counsel to stipulate that it was signed.

THE COURT: It is missing a couple of paragraphs that were cut off. It is part of Exhibit 18 which is in evidence. You may mark it again.

MR. ORSECK: May the record indicate that 18, with respect to 18 in evidence, a full copy is being substituted physically.

THE COURT: No, no. Leave the record the way it is.

MR. GRUBBS: We still have an objection as to the subsequent copy that is being offered at this time.

THE COURT: What is the basis of your objection?

MR. GRUBBS: No proper foundation.

THE COURT: What foundation is missing?

MR. GRUBBS: On page 4 he was asked about this, and there was not a definitive answer.

THE COURT: I will leave that out. This is apparently the order that was entered following the hearing.

MR. ORSECK: He wants everybody to think --

THE COURT: No, no. Don't argue.

Where is 18?

MR. ORSECK: Why did they pay the fine in violating that?

THE COURT: Don't argue the case now. Here we have a copy of it sent under covering letter of April 20th.

MR. GRUBBS: I am renewing the objection previously made, and that is to sustain our rights --

THE COURT: But the ground you raised for it was that there was no foundation, and I am trying to explore with you what the foundation was, and I find that your client sent along a copy. It seems to me that that supplies a foundation, does it not?

MR. GRUBBS: He is referring to that letter at this time? On the basis of what he read?

THE COURT: Overruled. Between what he read and Exhibit 18 I find there is adequate foundation.

MR. COLIN: I object to this being received as against Cities Service Oil Company.

THE COURT: This consent order is only an order against Monticello.

xxx

(Plaintiff's Exhibit 22 received in evidence.)

MR. ORSECK: Your Honor, may I read some portions?

THE COURT: Yes.

(Mr. Orseck read to the jury from Plaintiff's Exhibit 22 in evidence.)

MR. ORSECK: That's all with respect to Mr. Kwak's deposition.

THE COURT: Does defense counsel wish to read any part of this?

MR. GRUBBS: Yes, your Honor.

THE COURT: Do that, please.

MR. GRUBBS: Page 60, the middle of the page:

"Q After April of 1973 were investigations made by you or by others in DEC, with your knowledge, concerning conduct of MGO at the subject premises?

"A Yes, they were.

"Q Tell us about it?

"A The site was inspected by Mr. Lohman, who was my assistant and Mr. Sam Greene of MGO on October 11, and at the time it was found that all our conditions stated in the consent order were complied with and subsequently a letter was sent out on October 9th indicating this and that we considered this case

terminated."

MR. COLIN: I am reading now from the foot of page 23:

"Q And what was the snow clogging that you observed?

"A Snow was piled through the entire concrete ditch and the 55-gallon oil traps were plugged with snow and thereby not functioning.

"Q The drums also had snow in them?

"A Not in the drums themselves, the openings leading to the drums.

"Q From the ditch?

"A From the ditch.

"Q What would have been necessary to maintain the flow of liquids to the drums?

"A Proper snow removal.

"Q All right, and in your opinion who would be the personnel to effect the removal?"

MR. GRUBBS: Objection, your Honor.

THE COURT: Sustained.

(Pause.)

MR. COLIN: Reading from page 37:

"Q Is it your opinion, Mr. Kwak, that the procedures outlined in your letter of April 17th

would have eliminated the inadequacies in regard to this drainage system?

"A What I required was that MGO submit an engineering report and plan of the MGO property whereby all surface drainage from the property would be conducted into an oil trp which would be large enough to contain the oil for a 60-day period and which would provide for an easy method for oil removal."

MR. COLIN: Reading from page 28:

"Q Now, Mr. Kwak, you found the premises to be in proper condition so far as emission is concerned at some point in this month of October 1973?"

MR. COLIN: There was an objection noted. Do you press that objection, Mr. Orseck?

MR. ORSECK: We concede that in October of 1973 everything was done. There is no question.

THE COURT: We will take our break now.

(Jury excused.)

THE COURT: So that the record is clear, I overrule the question on page 25:

"Q Is it your belief that regular skimming of the oil from the surface of the two drums would not have effected a control or reduction of oil emissions from the premises?"

The reason I overruled that is that the objection as registered in the deposition was that there was no foundation, no testimony, that oil was not being skimmed from the drums. The objection did not go to the form of the question, which is the way I understood it to be. That objection not having been taken on the deposition, I deem it to have been waived.

Secondly, I sustained objection to Mr. Colin reading the question: "In your opinion who would be the personnel to effect the removal?"

I sustain that because Mr. Kwak obviously didn't know and was going to make an assumption, according to his answer. I will not permit the answer on that basis.

I have three open letters.

I am going to admit Exhibit 7 except for the last paragraph, about which I put pencilled brackets.

I will admit Exhibit 5 except for the words "for pollution," which begins on line in the text and ends up the sentence "Summer resort hotel" on the third line. That language is out.

I am admitting Exhibit 4 down through the words "State Pollution Committee," which is in the middle of the page. Thereafter the exhibit reads: "He said that they put him through the wringer with questions."

From there to the end of the text I am excluding it. Of course his signature remains.

I want to make an observation that as to Mr. Langbein, if there ever was any question as to whether he was a managing agent on the deposition, it is crystal clear from Exhibit 4 that he was intimately involved in all of the negotiations having to do with what to do with this plant, whether to close it, whether not to close it, what should be done, what steps should be taken and, indeed, he says in an excluded part, "If I am to be involved in anything here I surely trust I will be kept informed of any and all action concerning this property."

Exhibit 2 for identification, what is alternatively Exhibit 21, I have marked in circles. I have marked out certain things, dates of violations on page one; I have take out the word "polluter" at the top of page one; also, a third of the way down on page one, I have taken out everything under item six having to do with apparent ownership of the property.

I have taken out items 14 and 15 on page 8, and under 17, entitled "Comments," I am leaving in the second comment, but I am excluding the first, third, and fourth. Otherwise Exhibit 2 and Exhibit 21 for identification are received in evidence.

(Plaintiff's Exhibits 2, 4, 5, 7, and 21 received in evidence as qualified above.)

xxx

(Recess.)

(Jury in box.)

MR. ORSECK: Sam Greene, please.

S A M G R E E N E, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

xxx

BY MR. ORSECK:

Q Mr. Greene, where do you live?

A 45 Floral Drive, Monticello, New York.

Q Are you presently associated with the defendant, the third-party defendant, in this case Monticello Gas & Oil?

A I am employed by them.

Q In what capacity?

A Manager.

Q For how long have you been manager?

A April, 1968.

Q To the present time?

A To the present time.

Q Right before the recess you heard me read to the jury portions of the consent order; is that correct?

A Yes, I did.

Q With respect to that consent order you heard me read to the jury, that was not the first time you ever heard or saw it, is it?

A I don't remember seeing it before.

Q Did you know of its existence?

A I think our attorney mentioned it to me.

Q Was it your understanding that it was your obligation to comply with that order?

A Yes.

Q Did you attempt both orally and in writing to obtain compliance with that order by Cities Service?

MR. COLIN: I object to that.

THE COURT: I will sustain that on the ground of form.

Q Would you tell the jury what you or Monticello Gas & Oil did for the time being only with respect to the $500 fine after it was levied? What were all your discussions and your deeds only with respect to the fine after it was levied?

A I went to the trouble to find out what could be done to prevent the oil spillage from leaving our property.

Q I am talking about the $500 only. Maybe I didn't make myself clear. I will talk about the balance of the order. I'm only talking about the $500 fine.

What did you do about paying?

A We paid the $500 fine.

Q Tell everything that transpired with respect to that $500 fine after it was levied.

A I don't understand.

MR. COLIN: May we approach the bench, your Honor?

THE COURT: Ask him what he did.

Q Did you speak to anyone about the fine, from the time it was levied until the time it was paid?

A I don't understand. Did I speak to anybody?

Q Did you speak to anybody about the fine during the interval of time between --

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: I gather you want to get him to say that he talked to somebody at Cities Service about paying the fine. He doesn't understand your question. He is a manager of an oil plant; he is not a lawyer.

What do you anticipate? I know he is not your witness.

MR. ORSECK: One of the documents in evidence from Cities Service, Langbein said that Sam Greene was in touch with him and feels it is Cities Service' obligation to

pay the fine.

THE COURT: That conversation seems to me by itself really not admissible. Just because he feels something is somebody's obligation doesn't make it their obligation.

MR. ORSECK: Except the last paragraph that I read, the last paragraph is very, very broad as to who it applies to.

THE COURT: I listened to you read it and I don't believe it applied to Cities Service unless they took over the operation in some way.

If that's what you are going after with him, I would sustain an objection to that.

(In open court.)

BY MR. ORSECK:

Q You heard us talk about a hearing around April 3, 1972 before the Department of Environmental Conservation. You were present at that hearing?

A Yes.

Q After the hearing, you were in touch with Mr. Langbein; isn't that correct?

A Yes, I was.

Q You told him certain things, did you not about the hearing?

the hearing?

A Yes. Of course I mentioned what had to be done.

Q You told him with respect to the fine that if CITCO was represented the fine would have been much more, maybe $2500 a day, did you not?

MR. COLIN: Objection, your Honor.

A I don't remember that at all.

MR. ORSECK: I would like to read to the jury a portion of Exhibit 4 in evidence.

THE COURT: Hold on.

Go ahead with your examination.

Q Might you have said that?

MR. COLIN: Same objection.

MR. ORSECK: This is a party, your Honor.

THE COURT: What is your best recollection? Might you have discussed that subject or not?

THE WITNESS: I might have discussed it but I don't remember.

Q What else did you say to Mr. Langbein about the fine?

A I don't remember a discussion with Roy Langbein on the fine at all. I don't remember that.

Q Did you tell him that you would write a summary

of the meeting and forward copies to him?

A I think I wrote Roy a letter explaining to him what had to be done and the approximate expense. This is all I remember.

Q Tell the jury why you wrote him a letter telling him about the expense?

MR. COLIN: That is objected to.

THE COURT: Overruled.

A I wrote because Cities Service would have to pay the expense.

Q How about the fine?

A I think we paid the fine.

Q Did you ask him to pay the fine?

A I don't remember that.

Q In April of 1973 there is no question that the soil that the land upon which this bulk plant operated was saturated with oil; isn't that true?

MR. GRUBBS: Objection. I object to the form of the question.

THE COURT: Overruled.

A Yes.

Q There is no question where the oil came from, is there?

A No.

Q There is no question but that that oil went through the culvert, across the road, into the swamp, and into the Doralee --

A That I don't know.

Q The exhibit I just read, which was signed by MGO said, and it was signed by Monticello, a continuing study by the State demonstrates --

A They told us it was from our plant.

Q You agreed to it; you signed that document; isn't that so?

A I didn't see the document, sir.

Q With respect to the part of the order having to do with the fine, did you comply with that and pay the fine?

A We paid the fine.

Q With respect to either vacating the premises or doing something else, you complied with that too, did you not?

A Yes.

Q You complied with it because there was an order on consent; isn't that right?

A Yes.

Q It was on the consent of Monticello Oil?

A Yes.

Q And the order recited that the oil from the plant went into Doralee's lake?

MR. GRUBBS: Objection. The order speaks for itself.

THE COURT: I will sustain that.

Q Would you carefully, Mr. Greene, explain to the jury as though they were friends of yours in your living room what a commission agent is in the oil business?

MR. COLIN: Objection, your Honor.

THE COURT: What is the basis of the objection?

MR. COLIN: In the relevancy to the issues of this case in any way.

THE COURT: It might be if there is a foundation made that Monticello was a commission agent for somebody.

Q Was Monticello Gas & Oil ever a commission agent for Cities Service?

MR. COLIN: That is objected to, your Honor.

THE COURT: Overruled.

A The year that I came to work for them, 1968, and I think it was part of 1969 --

Q How about 1970?

A I don't think so. We were a distributor at that time.

Q Is it your testimony that you were not a

commission agent for Cities Service in 1970?

MR. COLIN: Objection, your Honor. He is bound by the witness' answer.

A I don't remember when we became a distributor. It was either in one of those three years, whether in 1968, 1969 -- it was either 1968 or 1969 or 1970 that we became a distributor. I can't give you the exact time.

THE COURT: What is a commission agent?

THE WITNESS: A commission agent is a person --

MR. COLIN: That is objected to.

THE COURT: Overruled.

THE WITNESS: A commission agent is a company that works strictly on commission for any manufacturer, major oil company on gasoline only. We were a commission agent only on gasoline.

Q The other type of operation is when a distributor owns the gallonage itself?

A We buy the gallonage from our source of supply and we distribute it at our own markup or our own price. We pay whoever it is for the gallonage or the product.

Q Would you tell the jury who owned the land from 1969 until the time the plant closed in October of 1973?

MR. COLIN: Objection, your Honor.

THE COURT: Overruled.

A Cities Service Oil Company.

Q They were the owner with a deed on record in the County Clerk's office?

A Yes, sir.

MR. COLIN: Objection.

THE COURT: Overruled.

Q Who owned the tanks?

A Cities Service Oil Company.

Q When we talk about the tanks we are talking about the 30,000-gallon tank that Mr. Motl talked about and the 10,000 --

A We had no 30,000.

Q Whatever it was.

A We had at that time 10, 10, 20, and 25. One tank was split in two, which was 10 and 10.

Q Those tanks were owned by Cities Service; is that right?

A Yes, sir.

Q How about pumps?

A Owned by Cities Service.

Q How about the building?

A Owned by Cities Service.

Q Under the terms of Monticello's arrangement with Cities Service was Monticello permitted to buy its

product any other place other than Cities Service?

MR. COLIN: Objection.

THE COURT: What is the basis of your objection?

MR. COLIN: It is not relevant to the issues of this case and the request certainly does not call for the best evidence on the point.

THE COURT: Maybe he knows and maybe he doesn't. I will overrule the relevancy objection. You may have an objection as a matter of law later and I will consider it at that time. The objection is overruled.

You may answer.

A Fuel oil, yes. Gasoline, no.

THE COURT: Fuel oil you could buy anywhere?

THE WITNESS: I could buy from anyone.

Q The fact of the matter is that no other purchases were made from anybody else during any of these times?

A Yes.

Q There was?

A Yes.

Q Of what? Gasoline or fuel oil?

A Fuel oil.

Q Tell the jury whether or not it is a fact that Cities Service made allowances periodically to paint your trucks?

MR. COLIN: Objection, your Honor.

THE COURT: Overruled.

A Yes. Cities Service reimbursed us for painting trucks.

Q When the trucks were painted, tell the jury what was on the trucks?

A The Cities Service colors and emblem.

Q At the entrance to the plant, what kind of sign was there?

A I think we had a Cities Service sign out there with Monticello Gas & Oil.

Q Who owned the safe at the plant at Cold Spring Road, and the typewriter, the adding machine, and the billing machine? Do you remember that Cities Service owned it?

A I can't give you an honest answer to that. I'm not sure.

Q There came a time in the early summer of 1973 when the plant was dismantled; isn't that so?

A Yes.

Q Would you tell the jury, to the best of your recollection, when that was?

A I believe it was started in the last week in May and finished up in June.

Q You were here yesterday when Mr. Colin made

his opening statement to the jury, were you not?

A Yes. I heard portions of it.

Q He told the jury that the plant was closed down and operation ceased in February of 1973?

MR. GRUBBS: Objection to the form of the question.

MR. ORSECK: I have the transcript.

#8 THE COURT: Establish when it was and make such comment as you are entitled to make at a later time.

Q Would you tell the jury who paid for the dismantling of the plant.

MR. COLIN: I object to that, your Honor.

THE COURT: Overruled.

A Cities Service Oil Company.

Q Would you tell the jury whether or not it is a fact that up to three feet of the top soil at the plant was removed at that time because it was oil saturated?

A I can't tell you the exact footage. I don't know how many feet were taken out.

Q Was it approximately that?

MR. COLIN: Let him finish.

A I was not there at the time. We were out of that plant and I didn't watch what they had done there.

Q You were not there at all when the plant was

being dismantled?

A I think I went there once or twice just for a few minutes and left. I didn't watch what they took or put back.

Q You were not there the day the tanks were removed?

A No.

Q And the oil spilled?

A No.

MR. GRUBBS: Objection to form.

THE COURT: Overruled.

Q Were you there that day?

A No, I was not.

Q Would you tell the jury what the gross gallonage of product was that was sold from the Monticello plant in 1972.

MR. COLIN: I object to that.

THE COURT: On what ground?

MR. COLIN: I don't think quantity sold is in any way relevant to this case.

THE COURT: I think this has some bearing on how many times trucks are loaded or not loaded.

MR. COLIN: If it is a foundation question and gets to something meaningful, that might be a different thing.

THE COURT: Objection overruled.

A I can't answer that question. The reason for it is much of that gallonage was delivered by trailer load.

Without my records I wouldn't know what came out of the plant and what came directly from our source of supply to the commercial accounts.

Q Would it be fair to say that it was in the rough vicinity of six million gallons?

A No.

Q What vicinity was it in during the calendar year 1972?

A Probably about two and a half million gallons.

Q How about the first half of 1973?

A I am talking about the year 1972.

The first half of 1973?

MR. GRUBBS: I object unless you are specifying from the particular plant on Cold Spring Road.

THE COURT: I assume so.

MR. GRUBBS: I object in the form it is asked.

THE COURT: There is no question.

THE WITNESS: He asked me the question and I answered.

THE COURT: That's from the Cold Spring plant?

THE WITNESS: Right.

You want to know what we moved in '73 from that same plant?

THE COURT: Right.

THE WITNESS: We were there forty days. We moved out of that plant February 10th. That's when we left the old plant. We are talking about one month? I have no idea what we moved.

Q I show you a document and ask you whether or not you recognize the signature at the bottom.

A Yes. That's Mernie Deutch.

Q And he was at one time an officer of Monticello Gas & Oil?

A Yes, he was.

Q Have you ever seen this document before?

A I may have seen it, yes.

MR. ORSECK: I would offer it in evidence.

MR. GRUBBS: If your Honor please, may we approach the bench on this document momentarily?

THE COURT: Let me have a quick look at it.

(Pause.)

(Plaintiff's Exhibit 23 marked for identification.)

xxx

THE COURT: Is there any unusual objection you have to that?

MR. GRUBBS: I would like to have a few words at the bench so we all understand each other on the use to which --

THE COURT: Why don't we admit this in evidence and discuss it at a later point?

xxx (Plaintiff's Exhibit 23 received in evidence.)

BY MR. ORSECK:

Q Mr. Hudson who was here the other day, he was here this morning too, did you ever see him before in your life?

A I don't remember, sir.

Q How about the man whose deposition I read, Mr. Kwak?

A I didn't know his name. I know the Ecology Department was over. I don't recall his name.

Q What I am trying to get at, Mr. Greene, is this: Forget about the dates and the number of incidents. You know of your own knowledge, because you saw him, members of the New York State Environmental Conservation Department, sometimes they were both at your place and Doralee to make inspections; isn't that correct?

A Yes.

Q A few more questions about the commission agency.

At the time --

MR. COLIN: I object to any interrogation on this line, your Honor, on the grounds previously stated, on the fact that this witness has testified that there was no commission agency after 1969 or 1970.

THE COURT: That objection is overruled.

Q You are here because I subpoenaed you?

A That's right.

Q In a commission agency operation, is it true that the oil company, such as by way of an example before 1970 in your instance, operates the plant and they pay so much a gallon to the commission agent for the gallonage that is sold?

MR. COLIN: I must object to this. It is a generalized hypothetical question. I think it impinges in the area of prejudice.

THE COURT: Ask him what they did at Monticello.

Q Tell us what the nature of the operation was when you, Monticello was a commission agent for Cities Service.

MR. COLIN: May I have a continuing objection, your Honor, so I won't have to rise all the time?

THE COURT: Yes.

A We were given a commission to deliver gasoline only to Cities Service's commercial accounts and service

stations.

Q What does that mean?

A It meant that any time we made a delivery of X number of gallons of gas, we were paid by Cities Service so much per gallon.

Q Would it be fair to say that you were working for Cities Service?

MR. COLIN: Objected to.

THE COURT: Sustained.

A No.

THE COURT: It calls for a conclusion.

Q Let me put it to you this way: To whom was payment made by the account?

A To Cities Service.

Q So the sale was made by Cities Service to these accounts, and what you did was you delivered the product and got a commission; isn't that true?

A Yes.

MR. GRSECK: I have no further questions.

CROSS-EXAMINATION

xxx BY MR. COLIN:

Q Before you became the manager for Monticello Gas & Oil Company in April of 1968, did you work for that company in any other capacity, sir?

A No, sir.

Q You were working elsewhere?

A Yes, sir.

Q In what business?

A I was in a retail business, sporting goods.

Q On the premises where you worked, did you have an office?

A At the terminal?

Q Yes.

A Yes, I did.

Q Did anyone else employed by Monticello Gas & Oil work there?

A Sure. I think we had two girls in the office at that time and the dispatcher.

Q These were all employees of Monticello Gas & Oil?

A Yes.

Q This was the total personnel that was present at the office in the period from 1971 on; is that correct, sir?

A Well, I don't know whether I put on girls after that period. We did employ additional help later on.

Q If you employed additional help, these were employees of Monticello Gas & Oil?

A Yes.

Q There were no personnel employed by Cities Service Oil Company at the terminal; is that correct?

A Yes, sir.

Q You were selling branded CITCO gasoline, were you not?

A Yes, we were.

Q That was a territorially known and identified brand, was it not?

A Yes.

Q It was sort of a red triangle?

A It was a triangle with three different colors of red with a white background.

Q And it said CITCO on the bottom?

A That's right.

Q You sold it to your customers and you represented the gasoline to be supplied to be CITCO's gasoline?

A That's correct.

Q There is no maker of CITCO gasoline other than Cities Service Oil Company, is there?

A No, I don't think so.

Q That's the only company that owns that brand?

A That's right.

Q You could not get gasoline from any source

other than Cities Service and furnish it under the brand CITCO, could you?

A That's true.

Q So far as fuel oil is concerned, you didn't sell it under a brand; is that correct?

A That's correct.

Q And you acquired it from various, different, oil companies?

A Two: Cities Service and Continental.

Q You stored both heating oil and gasoline in your tanks at the Cold Spring location; is that correct?

A Yes, we did.

Q You had an identifying sign at the entrance to your business premises at the Cold Spring plant, did you not?

A Yes.

Q Did it bear the name Monticello Gas & Oil or MGO Corporation on it?

A It had Monticello Gasoline & Oil on it.

Q And the CITCO sign was only the brand representation --

MR. ORSECK: I object to this testimony by Mr. Colin.

THE COURT: Sustained.

Q Did Cities Service Oil Company have any

personnel at the premises?

A No, they did not.

Q At these premises you did your bookkeeping, your record keeping, and your file maintaining; is that correct?

A That's correct.

Q For the products that you sold -- and I am referring to the period subsequent to 1969 or 1970; I am referring to the period when you were a distributor and not a commission agent -- in whose name were those sales billed?

A Monticello Gas & Oil.

Q And that goes for every product and every gallon that was billed out of the plant from that time down to now; is that correct?

A That's correct.

Q Cities Service Oil Company was not a seller from the time you became a distributor in 1969 or 1970 of anything that was removed from those tanks?

A That's correct.

Q I show you, sir, a copy of a document entitled "Lease to Tenant," which has defendant's Exhibit N-2 to identify it. I ask you whether you recognize the signature on behalf of MGO.

A Yes. I recognize these names.

Q Is that the signature of an officer of the corporation, a principal of the corporation?

A Yes.

Q Who is it?

A Sol Kleinman.

MR. COLIN: I offer this in evidence, your Honor.

(Defendant's Exhibit B was marked for identification.)

xxx

MR. ORSECK: No objection.

MR. GRUBBS: No objection, pursuant to the Court's rule as to what purpose it can be put to during the trial.

xxx

(Defendant's Exhibit B received in evidence.)

BY MR. COLIN:

Q Mr. Greene, the lease that was shown to you by Mr. Orseck that was first marked was made in 1969. Did you recall that?

A No.

Q I show it to you.

A Let me just state this: I am not familiar with these documents. These I leave strictly to our attorneys.

Q Did you see them?

A I may have glanced at them.

Q Did you see them in your office during the course of your work?

A Yes, but I never studied them.

Q I am trying to establish chronology.

A They were in my office, yes.

Q And the one that Mr. Orseck marked was the first one, and then it was suggested by the one that I had you just identify; is that correct, which was made in 1969?

A Yes.

MR. COLIN: With your Honor's permission, I would like to read very briefly from the body of these documents.

THE COURT: Can you hold that until we have had a little conference on this. Must you do that this evening?

MR. COLIN: I can do it at a later time.

THE COURT: Mr. Grubbs wants to have a little conference on the use of these documents.

MR. COLIN: I am at a point where it would be appropriate to do it, so perhaps we ought to have a conference.

(At the side bar.)

MR. GRUBBS: Your Honor, if he is trying to read an indemnity, I am going to object to it because according to law, as I have read it and submitted it to your Honor

that provision is not valid under New York law. If he has another thing he wants to read, I have no objection; I would like to know if he is going to use it for an improper purpose. If so I would object.

THE COURT: What did you have in mind?

MR. COLIN: Merely the provisions that say that the tenant shall make all repairs to the premises. That's in both leases.

THE COURT: What is the clause you say is invalid?

MR. GRUBBS: Indemnity.

MR. COLIN: I would not read that. It is news to me when you say it is invalid. If you have some law I would like to check it out.

MR. GRUBBS: For many years.

MR. COLIN: I have heard as between residents.

THE COURT: Do you have a case or two on that?

MR. GRUBBS: Yes. I have a memorandum.

(In open court.)

MR. COLIN: With your Honor's permission I will read to the jury from Plaintiff's Exhibit 23 in evidence offered by Mr. Orseck, paragraph six or a portion thereof.

(Mr. Colin read to the jury from Plaintiff's Exhibit 23 in evidence.)

MR. COLIN: The tenant here is MGO, Monticello Gas & Oil, and the landlord is Cities Service Oil Company.

The later lease, the one that succeeded or replaced the earlier one, which is Defendant's Exhibit B in evidence, provides as follows:

(Mr. Colin read to the jury from Defendant's Exhibit B in evidence.)

THE COURT: Can't we finish with this, gentlemen?

MR. COLIN: I have no further questions.

THE COURT: Hold your reading.

Mr. Grubbs has some questions doubtless. There may be some redirect. Let's go forward testimonially.

(Continued on next page.)

CROSS EXAMINATION BY MR.GRUBBS:

Q Mr. Greene, I believe you were asked when Monticello Gas and Oil left the plant on Cold Spring Road. What was the date on that?

A February 10 is when we moved out in its entirety.

Q Where did you move to?

A We went to Kaufman Road in Monticello, approximately three miles from this location.

Q When for the first time did work start in that new plant site?

A I think that it was either the end of April of the beginning of May of 1972.

Q As the work progressed in that construction of the new plant, what if anything occured so far as the whether was concerned?

A We had some bad breaks in the weather. We were pushing our contractor. I believe it was towards the end of August or in the beginning of September when we had almost three weeks of rain, which set us back substantially, andof course the power company set us back. They held us up, I think, 60 days. We could not get our current in on time.

Q Did you at the earliest possible date move into your new plant?

A Oh, yes. We were very anxious to move in.

MR. ORSECK: I move that the last answer be stricken.

THE COURT: I will allow it.

Q AFter you left Cold Spring Road in February of 1973,from then on who if anybody did anything to the premises you vacated?

A Well, I don't think it was done.

Q Did you exercise any supervision over that?

A No, we did not.

Q During the period did Cities Service send a salesman that used to come around?

A Salesmen used to come around and call on us regularly. These were salesmen who would discuss the bus ness and things of that sort.

Q Did the salesman do anything in connection with the premises?

A Not the salesman, but we did have maintaining -- Well, I believe Roy Langbein would be the man that covered us as far as maintenance of the plant was concerned.

Q To what part of the premises did that apply?

A Work to be done at the plant; work to be done at the service stations. I would have to go to Roy Langbein

to get permission to have it done so that Cities Service may pay for it.

Q Can you tell us any part of the plant or equipment that that involved?

A At one point they replaced the roof. At another point they painted all our tanks. At one time they replaced -- this is from memory -- I think it was a seven horsepower motor that went bad. They paid for the culvert. They paid for pans that we put under our loading racks to contain any of the drippings of oil.

Q And before any of that work was done did someone from Cities Service have to inspect and approve it?

MR. COLIN: Objection, your Honor.

MR. ORSECK: I think it is a good question.

THE COURT: What is the basis for the objection?

MR. ORSECK: I press the question.

MR. COLIN: It is a leading question.

THE COURT: Overruled.

A Yes. In order for Cities Service to pay any construction that had to be done at the plant, it had to be approved by someone, otherwise we could not get paid for it.

Q Was that the practice throughout the time that you were at that plant at Cold Spring Road?

A All major repairs was done and paid for by Cities

Service.

MR. COLIN: I move to strike and I object to the question.

THE COURT: You may cross examine. Overruled.

MR. GRUBBS: Thank you.

BY MR. ORSECK:

Q Before you, sir, is Exhibit 24 for identification. Is that a fair representation as to the signs that were there the last time --

A You are just asking the signs? Yes. You have got the complete sign there.

Q I didn't take the picture. As far as the signs are concerned that is the only thing I am interested in with that picture. It is a fair representation?

A Yes.

MR. COLIN: You have said you do not have the complete sign there.

MR. ORSECK: I offer it in evidence.

MR. COLIN: I would like to ask a question.

VOIR DIRE EXAMINATION

BY MR. COLIN:

Q Is this sign at the entrance to the premises?

A It was there.

MR. COLIN: I have no objection.

THE COURT: It will be received. Any further questions of Mr. Greene?

MR. GRUBBS: No objection.

MR. COLIN: I have no questions.

THE COURT: You are excused.

(Witness excused.)

xxx (Plaintiff's Exhibit 24 received in evidence.)

(Time noted: 4:35 p.m.)

(Adjourned to January 5, 1977 at 10:30 a.m.)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Murray H Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 311 W 97th St NY NY 10025.

That on the 16 day of JUNE, 1977, deponent personally served the within Joint Appendix Volume I of III upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

By leaving 1 true copy of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

Joseph D. Ahearn, Of Counsel
Grubbs, Leahy & Donovan
Attorneys for Third-Party Defendants-Appellees,
MGO Corp. and Monticello Gas and Oil Co., Inc.
233 Broadway
New York, New York

Murray H Berman

Sworn to before me this
16 day of June 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930308
Qualified in Queens County
Commission Expires March 30, 1979

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For: Gerald Orseck Esq(s).

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